(18,591.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 77.

THE WISCONSIN AND MICHIGAN RAILWAY COMPANY, APPELLANT,

vs.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1903.

1 United States Supreme Court.

WISCONSIN & MICHIGAN RAILWAY COMPANY, Appellant,
v.
PERRY F. POWERS, Auditor General of the State of Michigan, Appellee. } No. —.

Return to claim of appeal of the above named appellant from the circuit court of the United States for the eastern district of Michigan, southern division, in equity.

Jesse B. Barton, Esq., 311 Grand Central passenger station, Chicago, Ill., solicitor for appellant.
Horace M. Oren, Esq., attorney general, Lansing, Michigan, solicitor for appellee.

2 Pleas of the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, of the March Term, A. D. 1901.

WISCONSIN & MICHIGAN RAILWAY COMPANY
vs.
PERRY F. POWERS, Auditor General. } No. 3727.

Bill of Complaint.

And now on this day, that is to say on the 18th day of May, 1901, comes the complainant, Wisconsin & Michigan Railway Company, by Jesse B. Barton, its solicitor, and files in said court a bill of complaint, which bill of complaint is in words and figures following, to-wit:

UNITED STATES OF AMERICA, *Sixth Circuit*, } *ss:*

In the Circuit Court of the United States for the Eastern District of Michigan.

To the honorable judges of the circuit court of the United States for the eastern district of Michigan, in chancery sitting:

Humbly complaining showeth unto your honors your orator The Wisconsin and Michigan Railway Company, that it is a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin, by charter duly patented and issued
3 to it on, to-wit, October 26th, 1893, wherein and whereby it was authorized and empowered to construct, maintain, and operate a railroad from a point in the city of Marinette to some point in the boundary line between the States of Wisconsin and Michigan in the Menominee river in township thirty-four (34) north of range twenty-two (22) east.

That on, to-wit, October 23rd, 1893, the Menominee and Northern Railroad Company was duly created and organized under and by virtue of the laws of the State of Michigan and in and by its charter or articles of incorporation the said Menominee and Northern Railroad Company was authorized and empowered to construct a railroad in and through the county of Menominee in the State of Michigan from a point on the State line between the States of Wisconsin and Michigan in the Menominee river to the north line of section three (3) in township thirty-eight (38) north of range twenty-eight (28) west.

That in pursuance of its said charter and its said articles of incorporation the said Monominee and Northern Railroad Company did thereafter and on, to-wit, October 23rd, 1893, acquire property and right of way for the construction of its railroad over and along the route described in its said charter and articles of incorporation. That on, to-wit, October 23rd, 1893, the said Menominee and Northern Railroad Company in anticipation of the incorporation of your orator and under and by virtue of the laws of the State of Michigan then in force, sold and conveyed to your orator for a valuable consideration to it from your orator moving all of the property, rights and franchises of it, said Menominee and Northern Railroad Company, and your orator did on to-wit, October 26th, 1893, take
4 possession of all the property rights and franchises of the said Menominee and Northern Railroad Company and has ever since possessed, held, used and enjoyed the same; and your orator further represents that in order to ratify and confirm in your orator its right, title and interest in and to all the property, rights and franchises of said Menominee and Northern Railroad Company, it the said Menominee and Northern Railroad Company did thereafter and on, to-wit, August 3rd, 1894, by its deed of conveyance of that date, duly executed, sell, assign, transfer, convey, and set over to your orator all of its rights, interests and franchises aforesaid.

That upon the sale and conveyance aforesaid and after said October 23rd, 1893, your orator did construct its railroad upon and along the routes aforesaid, to-wit, the several routes described in the charter and articles of incorporation of your orator and in the charter and articles of incorporation of the said Menominee and Northern Railroad Company, and completed the same and put the same in operation, on to-wit, November 1st, 1894, and has ever since said November 1st, 1894, maintained and operated the same as one continuous line of railroad running from the city of Peshtigo in the State of Wisconsin to Faithorn Junction in the State of Michigan of which said continuous line of railroad 28 8/10 miles thereof are situated in the State of Wisconsin and 32 6/10 miles thereof are situated in the State of Michigan all of which is situated north of the forty-fourth parallel of latitude.

Your orator further represents that at and prior to the 27th day of May, 1893, those parts of the State of Michigan which are situated north of the forty-fourth parallel of latitude were rich in
5 minerals and lumber which to a large extent were undeveloped for lack of proper means of transportation; that such

parts were sparsely, or not at all settled except at and in the immediate vicinity of lake ports, and along the lines of the few railroads which had theretofore been constructed therein, and but a small area compared to the total area of the same had been developed for agricultural purposes; and that the history of agricultural development in such parts had shown that the progress of the same depended first on the removal of the timber valuable in commerce and the building up of mining and other interests in the interior and the creation of transportation facilities to the mining camps and other industrial centers and lake ports.

And your orator further represents that at the regular meeting of the legislature of the State of Michigan held in the year 1893 an act was passed which was approved and in force May 27th, 1893, entitled, "An act to amend section three of article three of act number one hundred and seventy-four of the public acts of eighteen hundred eighty-three, entitled, 'An act to amend sections seven, thirty, thirty-six and forty-one of article two, and sections three and five of article three, and section fourteen of article four, and to add two new sections to article two, to stand as sections forty-five and forty-six, and a new section to article five, to stand as section twenty-two of an act, entitled, 'An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owning or operating any railroad in this State,'" approved May one, eighteen hundred seventy-three, being act number one hundred and ninety-eight, session laws of eighteen hundred and seventy-three as amended by act number one hundred and seventy-four of the public acts of eighteen hundred ninety-one."

6 Section 3 of which said act is as follows:

SEC. 3. "Every railroad company formed under the provisions of this act or which now is or may hereafter be brought under the provisions of the general law of this State for the taxation of railway or railroad corporations and every railroad company owning or operating any railroad situated in whole or in part in this State shall, on or before the first day of July in each year, pay to the State treasurer on the statement of the auditor general a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, viz.: Upon all such gross income not exceeding two thousand dollars per mile of road actually operated within this State, two per cent. of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, two and one-half per cent. thereof; upon all such gross income in excess of four thousand dollars and not exceeding six thousand dollars per mile, three per cent. thereof; and upon all such gross income in excess of six thousand dollars per mile, not in excess of eight thousand dollars per mile, three and one-half per cent. thereof; and upon all such gross income in excess of eight thousand dollars per mile of road so operated, four per cent. thereof.

And when the railroad lies partly within and partly without this

State, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding the income derived from the business transacted by said company entirely within this State, such proportion of the income of said company arising from inter-
7 state business, as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so excepted shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon as is other real estate in the several townships or municipalities within which the same may be situated: Provided further, that the rate of taxation fixed by this act or any other law of this State shall not apply to any railway company hereafter building and operating a line of railroad within this State north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile, except in so far as said line so built shall extend south of said parallel, but no such company shall be entitled to the immunity from taxation herein provided, when the same is owned or operated by existing companies, until the report of earnings to the commissioner of railroads required by the laws of this State, containing the earnings of such lines hereafter built, separate and distinct from the earnings of existing lines shall be made and filed.

All acts and parts of acts contravening the provisions of this act are hereby repealed.

This act is ordered to take immediate effect

Approved May 27, 1893."

8 And your orator submits that neither it nor said Menominee and Northern Railroad Company was in existence on said May 27th, 1893, and that its gross earnings have never in any year subsequent to said May 27th, 1893, been equal to four thousand dollars per mile. And your orator further represents that at the time of the passage of the last mentioned act of the legislature of the State of Michigan, to-wit: May 27th, 1893, and at the time of the incorporation of said Menominee and Northern Railroad Company, to-wit: October 23rd, 1893, and at the time of the sale and delivery by the said Menominee and Northern Railroad Company of all its property, rights, and franchises to your orator, and at the time when your orator began the construction of its lines of railroads along and upon the routes aforesaid, large areas of timber adjacent to said routes were uncut and undeveloped and little or no agricultural development had been made along said routes and no

city, town or village had been built along said route except at the southern terminus thereof.

"That since the construction by your orator of the railroads along the routes aforesaid several towns or villages have been built along said routes, to-wit: Fisher, Nathan and Faithorn Junction, having an aggregate population of seven hundred persons and large tracts of land have been placed under cultivation and are now being cultivated, aggregating, to-wit: 1370 acres and large numbers of farms have been developed along and in the vicinity of said route, to-wit: 34 farms, for the products all of which your orator furnishes means of transportation to favorable markets and thereby the said State of Michigan and the inhabitants thereof have been materially benefited and the property in said State subject to taxation for State and local purposes has been and now is materially increased."

9 Wherefore your orator submits that by reason of the premises the provisions above quoted of the said act of the legislature of the State of Michigan became and were and are a valid part of a valid contract between your orator and said State of Michigan for a good and valuable consideration then and there moving to said State of Michigan from your orator the obligations of which are protected from impairment by virtue of the Constitution of the United States of America and by the constitution of said State of Michigan, by any subsequent acts of the legislature of said State of Michigan or by the acts or doings of any of the officers of said State pretending to act under or by authority of any subsequent acts of said legislature.

Nevertheless the said legislature of the State of Michigan regardless of your orator's rights in the premises did pass an act approved June 4th, 1897, entitled "An act to amend section three (3) of article three (3) of act one hundred and ninety-eight (198), session laws of eighteen hundred and seventy-three, as amended by act forty-five (45) public acts of eighteen hundred and seventy-nine, as amended by act one hundred and seventy-four (174), public acts of eighteen hundred and ninety-one, as amended by act one hundred and twenty-nine (129), public acts of eighteen hundred and ninety-three, entitled, "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all said roads and other corporations, owning or operating any railroad in this State," approved May one, eighteen hundred and seventy-three, being compiler's section three thousand three hundred and sixty (3360), Howell's Annotated Statutes of Michigan."

Which is in words and figures as follows, to-wit:

10 "SECTION 1. The People of the State of Michigan enact, That section three (3) of article three (3) of act one hundred and ninety-eight (198), session laws of eighteen hundred and seventy-three, as amended by act forty-five (45) public acts of eighteen hundred and seventy-nine, as amended by act one hundred and seventy-four (174), public acts of eighteen hundred and ninety-one, as amended by act one hundred and twenty-nine (129), public acts of

eighteen hundred and ninety-three, entitled, 'An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all said roads and other corporations, owning or operating any railroad in (this) the State,' approved May one, eighteen hundred and seventy-three, being compiler's section three thousand three hundred and sixty (3360), Howell's Annotated Statutes of Michigan, be and the same is hereby amended so as to read as follows:

SEC. 3. Every railroad company and union railroad station and depot company owning or operating any railroad situated in whole or in part in this State, shall, on or before the first day of July in each year, pay to the State treasurer on the statement of the auditor general a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, viz., namely: Upon all such gross income not exceeding two thousand dollars per mile of road actually operated within this State, two and one-half per cent. of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, three and one-half per cent. thereof; upon all such gross income in excess of four thousand dollars and not exceeding six thousand dollars per mile,
11 four per cent. thereof; and upon all such gross income in excess of six thousand dollars per mile, and not exceeding eight thousand dollars per mile, four and one-half per cent. thereof; and upon all such gross income in excess of eight thousand dollars per mile of the road so operated, five per cent. thereof; that all gross income of union railroad station and depot companies whose earnings are in excess of twenty thousand dollars per mile shall pay on all such gross incomes in excess of twenty thousand dollars per mile of road so operated, ten per cent. thereof. And when the railroad lies partly within and partly without this State, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State, such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so *accepted* shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities within which the same may be situated.

All acts or parts of acts contravening the provisions of this section of this act are hereby repealed."

12 And your orator represents that the several officers of the said State of Michigan now claims that said last mentioned act repealed and abrogated, said act approved May 27th, 1893, and that all the provisions thereof including that provision under which your orator was exempt from taxation for a period of ten years from and after November 1st, 1894, were repealed and abrogated, and so claiming the commissioner of railroads of said State has made out and certified to the auditor general of said State, statements of what they, said commissioner of railroads and said auditor general term specific taxes which said auditor general has demanded that your orator pay to the State treasurer of said State and which said auditor general claims now constitutes a lien on all of your orator's property and franchises in said State and he the said auditor general now threatens that unless your orator pay the same forthwith to said State treasurer, he the said auditor general will immediately institute summary proceedings under the laws of said State and enforce said alleged lien and sell your orator's property and franchises to satisfy the same, and as a penalty for non payment to annul all of your orator's corporate rights and franchises in said State of Michigan including the rights and franchises of said Menominee and Northern Railroad Company vested in your orator by purchase as aforesaid. And said officials further claim that they are sustained and upheld in their said position and contention by the decision and opinion of the supreme court of said State of Michigan rendered and given in the case of Manistee and North Eastern Railroad Company vs. Commissioner of Railroads, reported in 119 Michigan Reports 349, in which it is claimed said act

13 of 1897 was declared constitutional, reference to which decision and opinion is hereby made for greater certainty and particularity. That the claims of said commissioner of railroads and said auditor general are that a specific tax accrued against your orator's railroads, property, and franchises amounting to $298.07 for that part of the year 1897 subsequent to August 29th, 1897; amounting to $693.01 for the year 1898, and amounting to $852.79 for the year 1899 to all of which they have added penalties and for all of which including such penalties said auditor general has demanded payment as aforesaid; your orator hereby representing and declaring that the said officers in so estimating the said so-called specific taxes demanded of your orator acting pursuant to authority claimed to be conferred by the said act of 1897, did take and have taken as a basis therefor the entire income of your orator derived from its business transacted wholly within the State of Michigan, together with such proportion of its income derived from interstate business which the mileage of your orator's said railroad in the State of Michigan bears to the whole mileage of said railroad wherever situated.

And your orator further represents that the gross income received from it by the operation of so much of its said lines of railroad as

lie and are situated within the State of Michigan are and have been ever since said August 29th, 1897, largely derived from the transportation of freight and passengers from points in said State of Michigan to points in the State of Wisconsin and from points in the State of Wisconsin to points in the State of Michigan which is and was interstate commerce and your orator submits that any attempt to tax the same by the State of Michigan or its officers is an interference with interstate commerce and is illegal and void under the Constitution and laws of the United States.

14 And your orator further represents that its gross earnings on business which was transacted wholly within the State of Michigan was, from August 29th, 1897, to January 1st, 1898, the sum of to-wit; $3,320.00; for the year 1898 the sum of $7,844.49, and for the year 1899 the sum of $5,443.26; and that its gross earnings on interstate business which either originated or terminated in the State of Michigan, was from August 29th, 1897, to January 1st, 1898, the sum of to-wit: $8,850.00; for the year 1898 the sum of $19,875.96, and for the year 1899 the sum of $28,668.56; and your orator respectfully submits that in estimating taxes which it should pay to the State of Michigan the officers of said State have no power, authority or jurisdiction to tax your orator's said interstate commerce business, and that such taxation is an interference with and imposition upon interstate commerce and that the officers of said State are prohibited from making such interferences and imposition by the Constitution and laws of the United States.

Nevertheless and regardless of the premises, one Perry F. Powers, auditor general of the State of Michigan, claims that the several sums aforesaid constitute a specific tax against your orator and are a lien on your orator's property in the State of Michigan and that in default of payment of the same your orator is subject to summary proceedings in the courts of said State not only a sale of your orator's property for the payment of said alleged special taxes but for a forfeiture of all your orator's rights, licenses, and franchises in the said State of Michigan and threatens to and will institute such proceedings and will seriously embarrass your orator and cause its irreparable injury and involves it in a multiplicity of suits.

15 For-as-much, therefore, as your orator is without remedy in the premises, except in a court of equity, it exhibits to this honorable court this, its bill of complaint and prays that the said Perry F. Powers, auditor general of the State of Michigan, be made a party defendant hereto, and that he true answer make to this bill of complaint, but not under oath, his answer under oath being hereby expressly waived, that upon a final hearing hereof the said act of 1897, so far as the same repeals or attempts to repeal the said act of 1893, be adjudged and decreed as against your orator, to be in the impairment of a contract theretofore made with your orator, and unconstitutional and void; and that the said act of 1897 in so far as it provides for the imposition of taxes on the interstate commerce business of your orator, be adjudged and decreed to be an interference with and imposition upon interstate commerce and un-

constitutional and void, and that the said Perry F. Powers, auditor general of the State of Michigan be enjoined and restrained from collecting or attempting to collect, and from attempting to enforce the payment of said so-called special taxes levied and charged against your orator from and after August 29th, 1897, and that your orator have such other or further relief in the premises as in equity it is entitled to and to your honors shall seem meet.

May it please your honors to issue or cause to be issued a writ of subpœna in chancery directed to the said Perry F. Powers, auditor general of the State of Michigan, commanding him to be and appear before this honorable court on a certain day to be therein named and to stand to and abide by all orders and decrees entered herein.

That the writ of injunction issued out of this honorable court restraining and enjoining the said Perry F. Powers, auditor general of the State of Michigan, from collecting or attempting
16 to collect any so-called specific tax levied and assessed or pretended to be levied and assessed against your orator in the State of Michigan in the years 1897, 1898 and 1899, until the further order of this court; and your orator will ever pray, etc.

JESSE B. BARTON,
Solicitor for Complainant.

WISCONSIN AND MICHIGAN
RAILWAY COMPANY,
By JESSE B. BARTON, *Its Attorney.*

STATE OF ILLINOIS, }
Cook County, } *ss:*

O. A. Koss being duly sworn says he is the secretary of The Wisconsin and Michigan Railway Company, complainant in the above and foregoing bill of complaint and makes this affidavit as the agent and in behalf of said company; that he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge.

O. A. KOSS.

Subscribed and sworn to before me this 17th day of May, A. D., 1901.

[SEAL.] ROBERTA M. SHAW,
Notary Public.

17 *Subpœna.*

Afterwards, to-wit, and now on this day, that is to say, on May 18th, 1901, a writ of subpœna was duly issued out of and under the seal of this court, which writ of subpœna with due proof of service thereon was returned and filed the 11th day of June, 1901, in words and figures following, to-wit:

Circuit Court of the United States of America for the Sixth Circuit and Eastern District of Michigan, Southern Division, Sitting in Chancery.

[SEAL.] The President of the United States of America to Perry F. Powers, auditor general of the State of Michigan, a citizen of the State and resident of the eastern district of Michigan:

You are hereby commanded to be and appear in the circuit court of the United States of America, for the sixth circuit and eastern district of Michigan, sitting in chancery, before the judges thereof, at the circuit court room, in the city of Detroit, on the first Monday of July next ensuing, then and there to answer unto a bill of complaint exhibited against you as defendant by The Wisconsin & Michigan Railway Company, a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen and resident of said State, as complainant. And this you shall in no wise omit under the penalty of one thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of May in the year of our Lord
18 one thousand nine hundred and one, and of the Independence of the United States, the one hundred and twenty-fifth.

WALTER S. HARSHA, *Clerk.*

MEMORANDUM.—The above named defendant is required to enter his appearance in this suit with the clerk of this court, at his office in the city of Detroit, on or before the day on which this writ of subpœna is returnable, otherwise the bill of complaint in this cause will be taken *pro confesso* against said defendant.

WALTER S. HARSHA, *Clerk.*

Service of this subpœna is hereby acknowledged and accepted.

PERRY F. POWERS,
Auditor General,
By HENRY E. CHASE,
Deputy Attorney General.

Dated June 11th 1901.

19 *Præcipe for Appearance.*

Afterwards, to-wit, and now on this day, that is to say, on the 15th day of June, 1901, comes the defendant, Perry F. Powers, by Horace M. Oren, his solicitor, and files in said court a præcipe for appearance, which præcipe is in words and figures following, to-wit:

The Circuit Court of the United States, Eastern District of Michigan, Southern Division. In Equity.

WISCONSIN & MICHIGAN RAILWAY COMPANY
vs.
PERRY F. POWERS, Auditor General of the State of Michigan. } No. 3727.

In this cause, on motion of Horace M. Oren, attorney general, solicitor for Perry F. Powers, auditor general of the State of Michigan, defendant herein, it is ordered that the appearance of said defendant be and the same hereby is entered herein.

May 13, 1901.

HORACE M. OREN,
Solicitor for Defendant.

Business address: Capitol, Lansing, Mich.

20 *Entry of Appearance.*

Afterwards, to-wit, and now on this day, that is to say, on the 15th day of June, 1901, the appearance of said defendant was duly entered by the clerk of said court in the chancery order book kept in his office, which entry is in words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

WISCONSIN & MICHIGAN RAILWAY COMPANY
vs.
PERRY F. POWERS, Auditor General of the State of Michigan. } No. 3727. June 15, 1901.

In this cause, on motion of Horace M. Oren, attorney general, solicitor for Perry F. Powers, auditor general of the State of Michigan, defendant herein, it is ordered that the appearance of said defendant be, and the same is hereby entered. And on like motion it is further ordered that the complainant, or its solicitor, deliver copy of the bill of complaint to the solicitor for said defendant within twenty (20) days after service of notice of this order, and in default thereof that said bill be dismissed with costs as to said defendant.

WALTER S. HARSHA, *Clerk.*

21 *Demurrer.*

Afterwards, to-wit, and now on this day, that is to say, on the 25th day of June, 1901, come the said defendant by his said solicitor, and files in said court a demurrer to complainant's bill of complaint, which demurrer is in words and figures following, to-wit:

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

WISCONSIN & MICHIGAN RAILWAY COMPANY
vs.
PERRY F. POWERS, Auditor General of the State of Michigan. } No. 3727.

The demurrer of the above named defendant to the bill of complaint of the above named complainant.

This defendant by protestation, not confessing or acknowledging any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill; and for cause of demurrer showeth that under the facts stated in said bill of complaint, said complainant is not entitled to the relief prayed for, for the reasons:

1. That act No. 129 of the public acts of 1893, (approved May 27, 1893), set forth in said bill of complaint and relied upon by
22 said complainant as constituting a contract between itself and the State of Michigan, did not create and does not at the present time constitute a valid contract or a part of a valid contract between the said State and said complainant, exempting said complainant from taxation for the period therein specified.

2. That act No. 228 of the public acts of 1897, (approved June 4, 1897,) set forth in said bill of complaint, repealing and abrogating the exemption from taxation granted in said act No. 129 of the public acts of 1893, and under which this defendant and the commissioner of railroads have acted in computing the taxes of the said complainant, is a valid and constitutional law.

3. That this proceeding, though nominally against this defendant, is in fact a suit against the State of Michigan.

Wherefore, and for diverse other good causes of demurrer appearing in said bill, this defendant demurs theret- and prays the judgment of this court whether he shall be compelled to make any answer to said bill; and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

HORACE M. OREN,
Attorney General, Solicitor and of Counsel for Defendant.

Capitol, Lansing, Mich.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

June 24th, 1901.

HORACE M. OREN,
Of Counsel for Defendant.

STATE OF MICHIGAN,
County of Ingham, Eastern District of Michigan, } ss:

23 Perry F. Powers, being duly sworn, deposes and says: I am the above named defendant; and the foregoing demurrer is not interposed for delay.

PERRY F. POWERS.

Subscribed and sworn to before me on this 24th day of June, 1901.

GURDEN L. WRIGHT,
[SEAL.] *Notary Public, Ingham County, Michigan.*

Demurrer Argued and Submitted.

Afterwards, to-wit, and now on this day, that is to say, on September 9th, 1901, said demurrer was argued and submitted, a memorandum of which was duly entered by the clerk in the journal of the proceedings of said court, which memorandum is in words and figures following, to-wit:

At a session of the circuit court of the United States for the eastern district of Michigan continued and held pursuant to adjournment at the district court room in the city of Detroit on Monday the ninth day of September in the year one thousand nine hundred and one.

Present: The Honorable Henry H. Swan, district judge.

24 WISCONSIN & MICHIGAN RAILWAY Company
vs.
PERRY F. POWERS, Auditor General of the State of Michigan. } No. 3727. In Equity.

In this cause a demurrer coming on to be heard on this day is argued by counsel for respective parties and submitted, with leave to file briefs.

Order Sustaining 1st and 2nd Grounds of Demurrer.

Afterwards, to-wit, and now on this day, that is to say, on May 1st, 1902, an order was made in said cause, a memorandum of which was entered by the clerk in the journal of the proceedings of said court, which order is in words and figures following, to-wit:

At a session of the circuit court of the United States for the eastern district of Michigan continued and held pursuant to adjournment at the district court room in the city of Detroit on Thursday the first day of May in the year one thousand nine hundred and two.

Present: The Honorable Henry H. Swan, district judge.

25 WISCONSIN & MICHIGAN RAILWAY Company
vs.
PERRY F. POWERS, Auditor General of the State of Michigan.
No. 3727. In Equity.

This cause came on to be heard upon demurrer of the defendant to the complainant's bill, and the same having been duly argued and submitted, after due deliberation thereon, the said demurrer is sustained as to the first and second grounds thereof; and it is ordered, adjudged and decreed that the complainant's bill of complaint be, and the same is hereby dismissed with costs in favor of the defendant to be taxed and that said defendant have execution therefor.

Petition for Allowance of Appeal and Assignments of Error.

Afterwards, to-wit, and now on this day, that is to say, on May 19th 1902, come- the said complainant by its said solicitor, and files in said court its petition for allowance of appeal, and assignments of error, which petition and assignments are in words and figures following, to-wit:

UNITED STATES OF AMERICA, *Eastern District of Michigan,* } *ss:*

WISCONSIN & MICHIGAN RAILWAY Company
vs.
PERRY F. POWERS, Auditor General of the State of Michigan.
No. 3727. In Equity.

26 Comes now the complainant by its solicitor or counsel, and files its petition for allowance of appeal and assignment of errors herein, in the words following, to-wit:

Petition for Allowance of Appeal.

The above named complainant deeming itself aggrieved by the judgment, order and decree of said circuit court made and entered in the above cause on the first day of May, 1902, prays the court for the allowance of an appeal in said cause for the reasons specified in the assignment of errors filed herewith and prays the court that a transcript of the record, proceedings and papers upon which said judgment, order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

JESSE B. BARTON,
Solicitor for Complainant.

Dated May 17th, 1902.

Assignments of Error.

The complainant in its action in connection with this petition for an allowance of an appeal makes the following assignment of errors, which it avers occurred in the trial of said cause, to-wit:

1. The court erred in sustaining the demurrer of the defendant as to the first paragraph thereof.
2. The court erred in sustaining the demurrer of the defendant as to the second paragraph thereof.
3. The court erred in sustaining the demurrer of the defendant to the bill of complaint herein.
4. The court erred in dismissing the bill of complaint for want of equity.

27 For which several reasons the complainant asks that the judgment, order and decree of the United States circuit court for the eastern district of Michigan be in all things reversed.

JESSE B. BARTON,
Solicitor for Complainant, Wisconsin & Michigan Railway Company.

Order Allowing Appeal.

Afterwards, to-wit, and now on this day, that is to say on May 19th, 1902, an order allowing appeal was granted by the court, a memorandum of which was duly entered by the clerk in the journal of the proceedings of said court, which memorandum is in words and figures following, to-wit:

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit on Monday the nineteenth day of May, in the year one thousand nine hundred and two.

Present: The Honorable Henry H. Swan, district judge.

WISCONSIN & MICHIGAN RAILWAY COMPANY vs. PERRY F. POWERS, Auditor General of the State of Michigan.	In Equity. No. 3727.

28 On reading and filing the petition of the said complainant, by Jesse B. Barton, its solicitor, for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, together with the assignments of error upon which the same is based, it is by the court now here ordered that an appeal be allowed from the judgment, order and decree of this court made and entered in the above entitled cause on the first day of May, 1902, to the Supreme Court of the United States, and that the amount of the bond on appeal be, and the same is, hereby fixed at the sum of five hundred dollars ($500.00).

29 *Bond on Appeal.*

Afterwards, to-wit, and now on this day, that is to say on June 4, 1902, a bond on appeal was duly filed in said court, which bond is in words and figures following, to-wit:

Know all men by these presents, that we, the Wisconsin & Michigan Railway Company, as principal, and National Surety Company a corporation of New York State, as sureties, are held and firmly bound unto Perry F. Powers, auditor general of the State of Michigan in the full and just sum of five hundred dollars, to be paid to the said Perry F. Powers, auditor general of the State of Michigan, certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of June in the year of our Lord one thousand nine hundred and two.

Whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, southern division, in a suit depending in said court, between Wisconsin & Michigan Railway Company, complainant, and the said Perry F. Powers, auditor general of the State of Michigan, as defendant, a decree was rendered against the said complainant and the said complainant having obtained a claim of appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Perry F. Powers, auditor general
30 of the State of Michigan, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said Wisconsin & Michigan Railway Company, complainant, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WISCONSIN & MICHIGAN RAILWAY COMPANY,
By C. H. BOSWORTH, *Its President.* [SEAL.]

Attest: O. A. ROWE, *Secretary.* [SEAL.]

NATIONAL SURETY COMPANY,
By JOHN W. ANDERSON,
Resident Vice President.

[Seal of Surety Company.]

Attest: H. PENNY, JR.,
Resident Assistant Secretary.

[Seal of Railway Company.]

Approved by
HENRY H. SWAN,
U. S. District Judge.

Sealed and delivered in presence of
M. F. SCHUF.
J. T. JAMES.
E. E. PARMLEE.

Filed in clerk's office, June 4, 1902.
WALTER S. HARSHA, *Clerk.*

31 *Original Citation.*

The Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To Perry F. Powers, auditor general of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 17th day of June next, pursuant to a claim of appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, southern division, wherein The Wisconsin & Michigan Railway Company is appellant and you are appellee, to show cause, if any there be why the decree rendered against the said appellant as in the said claim of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of May, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-sixth.

HENRY H. SWAN,
U. S. District Judge, East. Dist. of Michigan.

I hereby accept service of the foregoing citation and enter appearance in the United States Supreme Court, as solicitor for appellee.

HORACE M. OREN,
Attorney General of the State of Michigan.

32 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

WISCONSIN & MICHIGAN RAILWAY COMPANY
v.
PERRY F. POWERS, Auditor General of the State of Michigan. } No. 3727.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal of the above named Wisconsin & Michigan Railway Company; that the above and foregoing is a true copy of the record and proceedings in said cause as the same appears of record

and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript therefrom and of the whole thereof, together with the original citation.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 13th day of June, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-sixth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: File No. 18,591. E. Michigan C. C. U. S. Term No. 77. The Wisconsin and Michigan Railway Company, appellant, *vs.* Perry F. Powers, auditor general of the State of Michigan. Filed June 23d, 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 77.

THE WISCONSIN AND MICHIGAN RAILWAY COMPANY, APPELLANT,

vs.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Brief and Argument for Appellant.

JESSE R. BARTON,
Solicitor for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 77.

THE WISCONSIN AND MICHIGAN RAILWAY COMPANY, APPELLANT,

vs.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

STATEMENT.

MAY IT PLEASE THE COURT:

This case comes to this Court by appeal from the decree of the Circuit Court of the Eastern District of Michigan, sustaining the demurrer of appellee to the bill of complaint of appellant and dismissing that bill for want of equity.

The bill sought to enjoin the Auditor General from enforcing the alleged lien for a specific tax levied against the Railroad Company under an Act of the Legislature of the State of Michigan, passed in 1897.

The Constitution of the State of Michigan is divided into a number of articles, which are again subdivided into sections. Article 14 is entitled "Finance and Taxation." Article 15 is entitled "Corporations." Section 1 of Article 15 of the Constitution provides that "Corporations may be formed under general

laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed," etc.

In 1873, the Legislature of the State of Michigan passed an act entitled "An Act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State." This act was divided into five articles, entitled, respectively: "Organization," "Corporate Powers and Duties of Directors," "Taxation," "Police Regulations," "Miscellaneous Provisions." Section 11 of Article 5 of this act contained the following provision: "This act may at any time be altered, amended or repealed, but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it." Section 3 of Article 3 of the Act of 1873 provided for an annual tax upon the gross receipts of railroad corporations without any exemptions. The Act of 1873 has never been revised as an entire act since its passage, but numerous sections have been amended in the manner prescribed by the Constitution of the State, and in 1893, Section 3 of Article 3 was amended and there was added thereto the following: "PROVIDED, FURTHER, That the rate of taxation fixed by this act or any other law of this State shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this State north of parallel 44 of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile, except in so far as said line so built shall extend south of said parallel, but no such company shall be entitled to the immunity from taxation herein provided, when the same is owned or operated by existing companies, until the report of earnings to the Commissioner of Railroads, required by the laws of this State, containing the earnings of such line hereafter built, separate and distinct from the earnings of existing lines, shall be made and filed."

All of the Northern Peninsula of Michigan lies north of the forty-fourth parallel, and that part of the main Peninsula of Michigan which lies north of the forty-fourth parallel in 1893 contained no towns of any considerable size, excepting the City of Manistee, which is but a short distance north of that parallel.

Subsequent to the date when the above mentioned Act of 1893 became a law, the Menominee & Northern Railroad Company was organized under the laws of the State of Michigan; and immediately upon its organization, and before any part of its line was constructed, and before the above mentioned law of 1897 went into effect, it sold all of its franchises and rights to the Wisconsin & Michigan Railway Company, a corporation of the

State of Wisconsin, incorporated after said act of 1893 went into effect, appellant in this case, under authority of the laws of the State of Michigan. (Rec., p. 2.) All of the line of railroad under consideration lies north of the forty-fourth parallel, and in the upper peninsula of Michigan. The gross earnings of appellant have never in any year subsequent to May 27th, 1893, when the first above mentioned act went into effect, been equal to $4,000 per mile. Before construction of the railroad, the country adjacent to the same was undeveloped and covered with large areas of timber, with little or no agriculture. Since the construction, towns and villages have been built up, timber has been cut off and marketed, and considerable areas of land put under cultivation. The railroad upon which the specific tax is sought to be enforced was completed and put in operation about November 1st, 1894.

By act approved July 4th, 1897, the Legislature of the State of Michigan amended Section 3 of Article 3 of the Act of 1873, as theretofore mentioned, so as to read as follows:

"Every railroad company and union railroad station and depot company owning or operating any railroad situated in whole or in part in this State, shall, on or before the first day of July, in each year, pay to the State treasurer, on the statement of the auditor general, a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, viz., namely: Upon all such gross income not exceeding two thousand dollars per mile of road actually operated within the State, two and one-half per cent. of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, three and one-half per cent. thereof; upon all such gross income in excess of four thousand dollars and not exceeding six thousand dollars per mile, four per cent. thereof; and upon all such gross income in excess of six thousand dollars per mile, and not exceeding eight thousand dollars per mile, four and one-half per cent. thereof; and upon all such gross income in excess of eight thousand dollars per mile of the road so operated, five per cent. thereof; that all gross income of union railroad station and depot companies whose earnings are in excess of twenty thousand dollars per mile shall pay on all such gross incomes in excess of twenty thousand dollars per mile of road so operated, ten per cent. thereof. And when the railroad lies partly within and partly without this State, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State, such proportion of the income of said Company arising from the

interstate business as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so excepted shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities within which the same may be situated.

"All acts or parts of acts contravening the provisions of this section of this act are hereby repealed."

Section 11 of Article 5 of the Act of 1873 has remained unchanged since the original passage of the act.

It is claimed by appellant, that: First, the Act of 1897 is a violation of the Constitution of the United States and the Acts of Congress in relation to commerce—it providing for the levy of a tax upon interstate commerce. Second, the act of 1897 is in violation of the Constitutions of the United States and of the State of Michigan prohibiting the passage of any law impairing the obligation of a contract. Third, the law of 1897 did not repeal the law of 1893 so as to take away from railroad corporations which had constructed their lines north of the forty-fourth parallel subsequent to the passage of the Act of 1893 the right of exemption from taxation on the same for the period of ten years after construction, where the gross earnings did not exceed $4,000 per mile.

BRIEF.

I.

IN GENERAL.

Board of Supervisors of Chippewa v. *Auditor General*, 65 Mich., 408.

Manistee & N. E. R. R. Co. v. *Com'rs of R. R.*, 118 Mich., 349.

II.

SECTION THREE OF ARTICLE THREE OF AN ACT TO REVISE "AN ACT TO REVISE THE LAWS PROVIDING FOR THE INCORPORATIONS OF RAILROAD COMPANIES AND TO REGULATE THE RUNNING AND MANAGEMENT AND TO FIX THE DUTIES AND LIABILITIES OF ALL RAILROAD AND OTHER CORPORATIONS OWNING OR OPERATING ANY RAILROAD IN THIS STATE," AS AMENDED BY THE ACT OF 1897, IS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES RELATING TO COMMERCE.

III.

THE ACT OF 1897, IF IT REPEALS THE ACT OF 1893 SO AS TO TAKE AWAY THE RIGHT OF EXEMPTION PROVIDED IN THE ACT OF 1893, IS IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS PROHIBITING THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

Binghamton Bridge case, 3 Wall., 51, 74, 75.
Salt Co. v. *East Saginaw*, 13 Wallace, 377.
Grand Lodge case, 166 U. S., 143.
Morawetz on Private Corporations, 2nd Ed., Sec. 318.
Humphrey v. *Pegues*, 16 Wall., 249.
E. T. V. G. R. Co. v. *Pickerd*, 24 Fed., 614.
Bergman v. *Building Association*, 29 Minn., 275.
Piqua v. *Knoop*, 16 How., 376.
Corvin v. *Board of Commissioners*, 1 McCrary, 521.
City Ry. Co. v. *Citizen's R. R. Co.*, 166 U. S., 557.
Wellman v. *C. & G. T. Ry. Co.*, 83 Mich., 600.
Travers v. *St. P. M. & N. Ry. Co.*, 76 N. W. Rep., 217.

IV.

THE LAW OF 1897 DID NOT REPEAL THE LAW OF 1893 SO AS TO TAKE AWAY FROM RAILROAD CORPORATIONS WHICH HAD CONSTRUCTED THEIR LINES NORTH OF THE FORTY-FOURTH PARALLEL SUBSEQUENT TO THE PASSAGE OF THE ACT OF 1893 THE RIGHT OF EXEMPTION FROM TAXATION OF THE SAME FOR THE PERIOD OF TEN YEARS AFTER CONSTRUCTION WHEN THE GROSS EARNINGS DID NOT EXCEED $4,000 PER MILE.

Com. v. *P. & E. R. R.*, 164 Pa. St., 252-261.
Detroit Street Ry. Co. v. *Guthard*, 16 N. W., 328.
C. & O. R. R. Co. v. *Miller*, 114 U. S., 176.
Travers County v. *St. P. M. & N. Ry. Co.*, 76 N. W., 217.
Colton v. *Montpelier*, 71 Vt., 413.
Binghamton Bridge case, 3 Wall., 51, 74, 75.
Sutherland on Statutory Construction, Sec. 481.
Endlich on Interpretation of Statutes, Sections 271 *et seq.*

ARGUMENT.

I.

IN GENERAL.

Under the Constitution of the State of Michigan the Legislature has at all times had the power to exempt from taxation. This was expressly held by the Supreme Court of the State of Michigan in *Board of Supervisors of Chippewa* v. *Auditor General*, 65 Mich., 408. The law which is attacked in this case was before the Supreme Court of the State of Michigan in the case of *Manistee & N. E. R. R. Co.* v. *Com'rs of R. R.*, 118 Mich., 349, in which it was attacked solely on the ground that it was a violation of the Constitutions of the United States and of the State of Michigan, prohibiting the passage of laws impairing the obligations of the contracts; and while that court in that case held that the exemption was only a bounty and that it was, therefore, subject to repeal, it held that the exemption was good and that the right to it was vested until repealed and that the company was exempted from taxation until the act went into effect.

II.

SECTION THREE OF ARTICLE THREE OF AN ACT TO REVISE "AN ACT TO REVISE THE LAWS PROVIDING FOR THE INCORPORATION OF RAILROAD COMPANIES AND TO REGULATE THE RUNNING AND MANAGEMENT AND TO FIX THE DUTIES AND LIABILITIES OF ALL RAILROAD AND OTHER CORPORATIONS OWNING OR OPERATING ANY RAILROAD IN THIS STATE," AS AMENDED BY THE ACT OF 1897, IS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES RELATING TO COMMERCE.

It is respectfully submitted that if this tax be upon the property and business of the corporation it comes within all of the rulings of this court which hold that it is not a tax upon interstate commerce. The act itself imposes a tax upon the property and business of the railroad corporation, and computes it upon the gross income; and where, as in this case, the railroad is partly in the State of Michigan and partly in another state, it provides that the gross income, for the purposes of taxation, shall be on the actual earnings in Michigan, computed by adding to the income derived from the business transacted entirely in the State such proportion of the income arising from *interstate business* as the length of the road over which interstate business is carried in that state bears to the entire length of the road over which said interstate business is carried. It is submitted that if this tax be

treated as a license fee solely imposed upon the corporation for conducting interstate commerce business as well as local business it would be in violation of the Federal Constitution.

III.

THE ACT OF 1897, IF IT REPEALS THE ACT OF 1893 SO AS TO TAKE AWAY THE RIGHT OF EXEMPTION PROVIDED IN THE ACT OF 1893, IS IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS PROHIBITING THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

As above shown, the Supreme Court of the State of Michigan has so construed the Constitution of that State that the Legislature has the power to grant exemption from taxation. The Legislature having the power to exempt from taxation, it might, unless prevented by a constitutional limitation, bind itself to such exemption, so that a contract would exist and would be irrepealable unless the right to repeal had been reserved. The power of the Legislature is plenary, and unless restricted by the Constitution it may exempt from taxation and may enter into a contract exempting from taxation; and, it appearing that there is no such constitutional limitation, the power to exempt extends to the power to contract for exemption.

It is conceded that in construing a grant, if there be doubt or ambiguity, everything is resolved in favor of the State and against the grantee. But that rule applies only in construing the language of the grant; for when the grant is in clear and unambiguous terms no rule of construction can be invoked, and the contract is to be dealt with the same as contracts between individuals are treated.

In the *Binghampton Bridge case*, 3 Wall., 51, 74, 75, the court lays down the rule in the following language: "The principle is this: that all rights which are asserted against the State must be clearly defined and not raised on inference or presumption; and if the charter is silent about a power, it does not exist. If on a fair reading of the instrument, reasonable doubts arise as to the interpretation to be given it, those doubts are to be solved in favor of the State; and when it is to be susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter and the powers conferred are plainly marked and their elements can be readily ascertained, then it is the duty of the court to sustain and uphold it and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants and overthrow

all other contracts." Applying this doctrine, then, an examination of the exemption clause of the Act of 1893 will show it to be clear and unambiguous. There can be no question as to the meaning of the language or the intent of the Legislature. It is as plain as a rule in simple addition, and it must follow from the rules so laid down by this court that it is the duty of this court to sustain and uphold it and to carry out the true meaning and intention of the Legislature.

This, then, leaves this case with a clear and unambiguous grant of an exemption for a period of ten years, with all presumptions of law in favor of its continuance during that period, with the burden upon the appellee to show everything that he claims may be an avoidance of, or the right to avoid, or an annullment of, the grant so made.

It is difficult to draw the line between a mere bounty which may be withdrawn at any time and a grant of a privilege which is irrepealable by reason of its contract character. One element of a bounty is that it is left indefinite as to duration, and by the nature and character of the thing it may be withdrawn as soon as it ceases to yield a benefit to the granting power. It would seem that this court has taken a view that where a corporation is incorporated in view of the grant of a privilege to it by the Legislature, then that grant is not a bounty, but is a contract. In the case of *Salt Co.* v. *East Saginaw*, 13 Wallace, 377, as reviewed in the *Grand Lodge case*, 166 U. S., 143, this position was taken. What was said in the *Grand Lodge case* with reference to a special charter applies equally to a corporation acting under a general law. Morawetz (2nd Ed., Sec. 318) says: "The same rule of construction applies to articles of incorporation adopted pursuant to general laws as to the charters of incorporations granted by special acts of the Legislature. In construing the extent of the rights of franchises of a corporation and the powers of its agents, substantially the same implications must be made whether the company was incorporated under a general or by special act."

Humphrey v. *Pegues*, 16 Wall., 249.

E. T. V. G. R. Co. v. *Pickerd*, 24 Fed., 614.

Bergman v. *Building Association*, 29 Minn., 275.

Piqua v. *Knoop*, 16 How., 376.

Corbin v. *Board of Commissioners*, 1 McCrary, 521.

It is not conceded that Article 3 of the Act of 1873 was any part of the charter or articles of incorporation of either the Menominee & Northern or the Wisconsin & Michigan Railway Company, but the foregoing sustains this claim, that where there is a general act of the Legislature granting an exemption from taxation for a period of years to a public service corporation which is thereafter incorporated and performs all that can be required of it to earn the exemption, then, no matter whether

the laws under which exemptions are granted are general or special, the grant becomes a contract and irrepealable.

This court holds that the operation of a railroad is a sufficient consideration for a grant so as to constitute such grant a contract and irrevocable.

City Ry. Co. v. *Citizen's R. R. Co.*, 166 U. S., 557.

Cases cited in *Grand Lodge N. O.*, 166 U. S., 143.

Under the laws of Michigan a railroad corporation of the State of Wisconsin may acquire all of the charter rights, privileges, benefits and property of a corporation of Michigan for the purposes of extending the Wisconsin railroad into Michigan.

At the time of the incorporation of the Menominee & Northern and the incorporation of appellant and the purchase by the appellant of all the rights of the Menominee & Northern and the construction of the line of railroad in question, the grant from the State was the right to construct a railroad, which, being north of the forty-fourth parallel, should be exempt from taxation for a period of ten years, unless its gross receipts exceeded four thousand dollars per mile, and in pursuance of this grant the railroad in question was built and put in operation. It has developed the country and increased the taxable property of the State, as was undoubtedly contemplated by the Legislature in 1891 and 1893. It has given all the consideration required of it—a good, valuable consideration—and is now entitled to the benefits of the grant.

In construing this question of consideration the court will take judicial notice of all of the conditions which exist north of the forty-fourth parallel and especially in the upper peninsula of Michigan, in which this railroad is located. The Supreme Court of Michigan, in *Wellman* v. *C. & G. T. Ry. Co.*, 83 Mich., 600, says: "We are authorized to take judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in the upper peninsula is much greater than that in the lower, owing to marked difference between them in the character and face of the country. This distinction has been carried in the railroad law of the State for over seventeen years; and distinctions in the legislation upon many matters between the two peninsulas have been constant and frequent ever since the upper peninsula has been a part of Michigan."

The Supreme Court of Minnesota, in *Travers* v. *St. P. M. & M. Ry. Co.*, 76 N. W. Rep., 217, states, with reference to the State of Minnesota, what may as well be applied by this court with reference to the northern part of the State of Michigan, that: "It is a part of the legislative history of Minnesota both as a territory and a state, that its policy in regard to taxing land grant roads was adopted with reference alike to facilitating the early construction of these lines of road and to securing to the State what

was supposed an ultimate and adequate return for the value of the franchises conferred and which would, in the long run, be equivalent to the companies' fair share of taxation."

The court should also take into consideration the control which the State exercises over railroads in their operation, and the duties imposed by the State, the restrictions as to charges for carrying imposed by the State, and the general public character of a railroad company. A railroad company assumes to perform *a public function;* its road is a public highway and the assumption of the public duties are held to be a sufficient consideration for any special legislative grant to a railroad company.

It may be claimed that the reservation in the Constitution of the State of Michigan authorized the withdrawal by the Legislature of the right of exemption granted by the Act of 1893. It is respectfully submitted that this claim, if made, would be untenable. The reservation in the Constitution is in Article 15, which relates solely to corporations, and states that all laws passed pursuant to that section might be amended, altered or repealed. No such reservation is found in any other article or section of the Constitution, and, therefore, the reserved right must be applied only to legislation passed under that article. As has been shown, the Act of 1873 was subdivided into articles. Article 3 of that act was not passed in pursuance of any power given by Article 15 of the Constitution, but under the provisions of Article 14 of the Constitution, and, therefore, the reservation cannot affect Article 3 of the act. It certainly cannot be claimed that the reservation in the Act of 1873 to alter, amend or repeal can give to the Legislature the power to withdraw this exemption, because that reservation expressly states: "but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it."

IV.

THE LAW OF 1897 DID NOT REPEAL THE LAW OF 1893 SO AS TO TAKE AWAY FROM RAILROAD CORPORATIONS WHICH HAD CONSTRUCTED THEIR LINES NORTH OF THE FORTY-FOURTH PARALLEL SUBSEQUENT TO THE PASSAGE OF THE ACT OF 1893 THE RIGHT OF EXEMPTION FROM TAXATION OF THE SAME FOR THE PERIOD OF TEN YEARS AFTER CONSTRUCTION, WHEN THE GROSS EARNINGS DID NOT EXCEED $4,000 PER MILE.

It is respectfully submitted to the court that a legislature will never be presumed to have withdrawn a grant accepted by a grantee in good faith and for which a valuable consideration has passed to the State.

The exemption clause of the Act of 1893 amending the sections of Article 3 of the Railroad Act of 1873 is, in a sense, a special act relating to a particular part of the State of Michigan, which, as has been seen, is sustained by the Supreme Court as to that territory. The only repeal of the Act of 1893, excepting the general repeal by implication which is assumed from a general revision of a law, is contained in the last paragraph of the Act of 1897, to-wit: "All acts or parts of acts contravening the provisions of this section of this act are hereby repealed." It has been frequently held by many courts that this language of repeal does not repeal a prior special act; but, for brevity, we call the attention of the court only to the case of *Com.* v. *P. & E. R. R.*, 164 Pa. St., 252-261, which was a case identical with the one at bar, excepting that the exemption was contained in a special charter act, or rather a special act amending the original charter. The language of the court on page 264 is here quoted not only to sustain the position that the Act of 1897 did not repeal the exemptions contained in the Act of 1893, but as well on the question of consideration: "The full benefit and advantage of this contract has accrued to the Commonwealth. Her territory has been vastly improved over the whole length of the road. More business interests have been established, towns and cities have been built, population has largely increased, and a region which was an almost unbroken wilderness in 1852 when the act in question was passed, is now a cultivated country, abounding with population in pursuing innumerable industries and contributing immensely to the wealth of the Commonwealth and to the increase of its revenues. Upon no principle of common justice, of sound morality or of special law can such be imputed to be the contract. In our judgment, the grant of exemption from taxation in the Act of 1852 was a term of the contract, and in no sense a mere condition that is held out as a bait to ensnare the public to part with their money and then deny them the terms of consideration upon which it was given. But the Commonwealth has not expressed any such purpose. The exempting Act of 1852 and the General Taxing Law of 1879 can easily stand together and be administered without conflict, and, therefore, there is no inconsistency on which to found a repeal by implication."

And it is respectfully submitted that the exemption clause of the Act of 1893 may as well stand now since the passage of the Act of 1897 as before the passage of the latter act.

The question of the reservation of the right to repeal is a peculiar one in this case. As above stated, the constitution of the State of Michigan gives to the Legislature certain powers of taxation, including the imposition of specific taxes, and no limitations or restrictions were placed on the Legislature as to

uniformity of specific taxes. Under Article 14 of the Constitution, the Legislature could impose specific taxes without any regard to uniformity, and could exempt therefrom. Under Article 15 of the Constitution the Legislature was limited in its powers. It cannot create a corporation, except for municipal purposes, except by a general law. All laws passed pursuant to the first section of that article might be amended, altered or repealed. Reading this *section of Article 15 of the Constitution* alone, it provides that no corporation, except for municipal purposes, may be formed, unless by a general law; and such general law, so far as it forms a corporation, may be amended, altered or repealed.

The Act of 1873, as above stated, is divided into a number of articles. Article 3 related, and, through all its subsequent amendments has related, solely to specific taxes imposed upon railroads, and was clearly passed under Article 14 of the Constitution; so that to Article 14 of the Constitution we must look for any restrictions or limitations on the Legislature as to Article 3 of the Act of 1873. There being no reserved power of amendment, alteration or repeal in Article 14 of the Constitution, the Legislature was empowered—so far as the Constitution went—to pass Article 3 of the Act of 1873, and covenant that it should be unalterable and irrevocable; and it is only so much of the Act of 1873 as was passed in pursuance of Article 15 of the Constitution and the restrictions upon the legislative powers therein contained, that is subject to that provision of Article 15 of the Constitution providing for amendment, alteration and repeal.

The Legislature having in view this construction of the Constitution, and knowing that Article 3 of the Act of 1873 was not subject to the right of amendment, alteration or repeal reserved in Article 15 of the Constitution interpolated in the Act of 1873 as Section 11 of Article 5 thereof, the following: "This act may at any time be altered, amended or repealed; but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it." Any other view than that herein taken would render Section 11, Article 5, Act of 1873, meaningless: because, if the right to amend, alter or repeal the entire Act of 1873, or any part of it, had been reserved unqualifiedly in Article 15 of the Constitution, then it was useless to reserve that right at all, and worse than useless to attempt to reserve it with an exception, for no exception should be made.

It is clear, therefore, that the reservation in Article 15 of the Constitution has no application whatever to Article 3 of the Act of 1873.]

If, then, the reservation in Section 3, Article 3, of the Act of 1873, excepts the right claimed by the complainant herein, the exception is good and complainant is entitled to exemption contained in the Act of 1893. While we do not admit that the general Act of 1897 did repeal the exemption from taxation contained in the Act of 1893, yet, if it did, and such repeal affected the rights of property of this company, which was organized under it, then those rights exist and are protected by the very act itself; and the question is resolved into the simple one of whether or not this exemption is a right of property. It was held in the case of *Detroit Street Ry. Co.* v. *Guthard*, 16 N. W., 328, that exemption from taxation is not a "corporate right;" in *C. & O. R. R. Co.* v. *Miller*, 114 U. S., 176, it was held that such exemption was not a franchise; while in *Travers County* v. *St. P. M. & N. Ry. Co.*, 76 N. W., 217, and in *Colton* v. *Montpelier*, 71 Vt., 413, it was held that it was a property right. The Act of 1897, if it provides for the taxation of the complainant company, provides that such taxation shall be a lien on the railroad of the company which earns the moneys forming the basis for the computation of the tax. It is this lien which we ask the court to restrain the Auditor General from enforcing. The lien is a burden on the property; the right of exemption from that lien is necessarily a right of property.

It is doubtful if the language of either the Constitution or the Act of 1873, reserving powers, was intended to affect a corporation which should be organized under the Act of 1873, in any other respect than in the exercise of the ordinary police powers over them; that is to say, if a corporation be created under the law of 1873 with certain general powers to exist for a certain period, would a repeal—an absolute repeal—of the law of 1873 affect the existence, or the right of exercise of general powers, of that corporation? It is true that with the act repealed no new corporation could be formed, but it is submitted that it would not have the effect of destroying the corporate existence of those organized before the repeal. There are but two agencies capable of conducting the business of operating a railroad, namely: the State and a private corporation. It surely was not contemplated by the people in the adoption of the Constitution that the Legislature might pass a general law for the incorporation of railroads, and, as soon as a sufficient number were incorporated and the roads constructed, repeal that act and thereby put out of existence the corporations which constructed the roads. Surely upon incorporation and construction a railroad company has acquired some vested rights that cannot be taken from it; and it was the intention of the people that they should not be taken from it. The people undoubtedly intended that, as to things pertaining to public welfare, the general incorporation act might be amended

or altered so as to affect corporations created under it, but not to annul their charters or take from them vested property rights for which they had paid good and valuable considerations.

The language of this court in the *Binghampton Bridge case* is again called to your special attention, and it is submitted that as the Act of 1893 is not ambiguous, and as a good consideration passed from the railroad company for the grant therein contained, it is the duty of this court to sustain and uphold the contract and to carry out the true meaning and intention of the parties to it.

In Sutherland on Statutory Construction, Section 481, and Endlich on Interpretation of Statutes, Sections 271, *et seq.*, and in the numerous cases there cited, and still more cases reported since the publication of those works, the doctrine is announced that a statute affecting rights and liabilities should not be construed as to act upon those already existing, and it is a result of the decisions that, although the words of a statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise, unless the intention to embrace all is clearly expressed. This is the doctrine of the courts as applied to repeals; and where rights have become vested, in many cases it has been held that the broadest and most clear and distinct general terms of repeal will be construed to mean the exception of those cases which arose under the repealed statute and where rights have been vested therein.

In this case, the Act of 1873 stood, before the passage of the amendment of 1897, with a proviso that any amendment or alteration of the same should not affect the rights of property of companies organized under it; and so it stood after the passage of the amendment of 1897. Clearly, then, it was the intention of the Legislature that the amendment of 1897 should not affect property rights already vested; therefore, with much more force than could have been claimed in the cases cited by Sutherland and Endlich, can it be claimed in this case that the amendment of 1897, with its statement that all acts or parts of acts contravening the provisions of that section and that act were thereby repealed, did not and was not intended to withdraw the property right of exemption from taxation for a period of ten years that had been granted to appellant by the Act of 1893.

Respectfully submitted.

JESSE B. BARTON,
Solicitor for Appellant.

FILED
OCT 30 1903
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1903.

No. 77.

WISCONSIN AND MICHIGAN RAILWAY COMPANY,
Complainant and appellant,

v.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN,
Defendant and appellee.

BRIEF FOR THE DEFENDANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

CHARLES A. BLAIR,
Attorney General of Michigan
Solicitor for appellee.

ROGER IRVING WYKES,
Of Counsel.

[File No. 18501.]

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BRIEF FOR THE DEFENDANT.

Statement.

The Constitution of the State of Michigan, adopted in 1850, is divided into articles, which are subdivided into sections. Article XIV is entitled, "Finance and Taxation;" article XV is entitled "Corporations;" article XVIII is

entitled "Micellaneous Provisions," and article XIXa is entitled "Railroads."

Section 1 of article XV is as follows:

> "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed. But the legislature may, by a vote of two-thirds of the members elected to each house, create a single bank with branches."

Section 2 of article XVIII relates to the exercise of the right of eminent domain. Section 1 of article XIX A provides:

> "The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State."

In 1873 the present general railroad law was enacted, entitled "An Act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State." This law is also divided into articles, which are subdivided into sections; article III being entitled "Taxation," and article V, "Miscellaneous Provisions," and containing, in section 11, the following provision:

> "This act may at any time be altered, amended, or repealed, but such alteration, amendment, or repeal shall not affect the rights of property of companies organized under it; nor shall the dissolution of any such company take away or impair any remedy given for or against such corporation, its stockholders or officers, for any liability which shall have been previously incurred; and the provisions of this act shall apply to all companies incorporated or existing under the laws of this State, except the Paw Paw railroad company, which shall in no manner be affected by

> the passage of this act, in respect to the franchises and privileges heretofore granted to said company."

This law since its enactment in 1873 has, from time to time, been altered and amended to meet changing conditions and arising necessities; and in 1893 (by act 129, set forth in full in appendix), section 3 of article III, providing the method and rate of taxation was amended, a proviso being added which read:

> "That the rate of taxation fixed by this act or by any other law of this State shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this State north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile, except in so far as said line so built shall extend south of said parallel, but no such company shall be entitled to the immunity from taxation herein provided, when the same is owned or operated by existing companies, until the report of earnings to the Commissioner of Railroads required by the laws of this State, containing the earnings of such lines hereafter built, separate and distinct from the earnings of existing lines, shall be made and filed."

In October, 1893, the Menominee & Northern Railroad Company was created and organized under the general railroad laws of the State of Michigan, its rights and privileges being immediately thereafter acquired by the complainant (act 102 of 1893), which constructed its line of road in the State of Michigan, and became entitled to the exemption contained in the proviso above quoted.

In 1897 (by act 228, set forth in full in appendix), the proviso incorporated in section 3 of article III of the general railroad law of the State of Michigan by act 129 of the public acts of 1893, was repealed, and the exemption from taxation therein contained abrogated, and subsequently the Commissioner of Railroads computed the taxes to be paid by

the complainant, in accordance with the general railroad law as amended by said act 228 of the public acts of 1897, and filed said computation with the Auditor General, as required by law.

The bill of complaint in this case was filed in the circuit court for the eastern district of Michigan to restrain the collection of those taxes, on the principal ground that the act of 1893, granting exemption to the complainant upon a compliance with its provisions, became and constituted a contract between it and the State, which could not be revoked or altered, and that, therefore, the act of 1897 repealing and abrogating such exemption contravenes the Federal Constitution as violating the obligation of contract. The bill of complaint was demurred to, the grounds of demurrer being set forth as follows:

> "1. That act No. 129 of the public acts of 1893 (approved May 27, 1893), set forth in said bill of complaint and relied upon by said complainant as constituting a contract between itself and the State of Michigan, did not create and does not at the present time constitute a valid contract or a part of a valid contract between the said State and said complainant, exempting said complainant from taxation for the period therein specified.
>
> "2. That act No. 228 of the public acts of 1897 (approved June 4, 1897), set forth in said bill of complaint, repealing and abrogating the exemption from taxation granted in said act No. 129 of the public acts of 1893, and under which this defendant and the Commissioner of Railroads have acted in computing the taxes of the said complainant, is a valid and constitutional law.
>
> "3. That this proceeding, though nominally against this defendant, is in fact a suit against the State of Michigan."

This demurrer was sustained by the circuit court, without opinion, and the case is here on error to that court.

Argument.

Does the act of 1897 have the effect of repealing the act of 1893, containing the exemption in question.

In its brief in the court below, complainant and appellant argued that the act of 1897 (228) even though valid did not have the effect to repeal the previous act of 1893 (129). This question has been passed upon adversely to that claim by the State supreme court in the case of *Manistee & Northeastern Railroad Company* v. *Commissioner of Railroads* (118 Mich. 349), and this is final, under the rule stated by this court in the late case of *Northern Central Railway Company* v. *Maryland,* as follows:

> "Where a contract is claimed to arise from a State law and it is held below that a subsequent statute has repealed the alleged contract and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a State and not a Federal question. In such a case this court concerns itself not with the question whether the State law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the State court has given effect to a subsequent law, this court decides whether such effect, so given by the State court, violates the Constitution of the United States. *Gulf & Ship Island Railway Company* v. *Hewes,* 183 U. S. 66." (187 U. S. 261.)

The repeal having taken place, we, therefore, consider whether it was beyond the power of the State to effect such repeal.

Points.

I.

In considering whether a State has contracted away its sovereign powers, nothing is to be taken against the State by intendment.

The rule that nothing is to be taken by intendment against the State is particularly applicable to claimed exemptions from taxation. The right of taxation is a sovereign right, inherent in every sovereignty whose existence and exercise are essential to the existence and continuance of government, and although in certain instances it may be granted away, every presumption is against the grant, which is not to be extended beyond what is actually expressed. The exemption must be clearly made out, and doubt is fatal to the claim. In the leading case of *Providence Bank* v. *Billings,* Chief Justice Marshall, speaking for the court, says:

> "That the taxing power is of vital importance; that it is essential to the existence of government; are truths that it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. * * * As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." (4 Peters 561.)

Gilman v. Sheboygan, 67 U. S. 510;
Ohio, L. Ins. & T. Co. v. Debolt, 57 U. S. 435;
Railroad Co. v. Maryland, 10 How. 393;
Bank v. Skelley, 1 Black, 447;
Railroad Tax, 18 Wall. 225;

Railroad Co. v. Loftin, 98 U. S. 559;
Newton v. Board of County Commissioners, 100 U. S. 561;
Vicksburg, etc. R. Co. v. Dennis, 116 U. S. 665, 668;
Southwestern R. R. Co. v. Wright, 116 U. S. 231, 236;
Erie R. Co. v. Pennsylvania, 21 Wall. 492, 499;
Memphis Gaslight Co. v. Shelby Taxing Dist., 109 U. S. 39, 401;
Yazoo, etc. R. Co. v. Thomas, 132 U. S. 174, 185.

The later cases have repeatedly affirmed and reiterated the views of Chief Justice Marshall, as expressed in the case of *Providence Bank* v. *Billings.* In *Vicksburg, etc. R. Co.* v. *Dennis,* supra, the language used was:

> "It has been said that 'Neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;' that exemption from taxation 'should never be assumed unless the language used is too clear to admit of doubt;' that 'nothing can be taken against the State by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the State, that a State 'cannot by ambiguous language be deprived of this highest attribute of sovereignty;' that any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the con-

> cession clearly require;' and that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed strictissimi juris.'" (116 U. S. 668.)

II.

The grant of exemption claimed was a mere gratuity which has not the elements of, and cannot be construed into, a contract.

The act of 1893 (129) creating the exemption, was a mere bounty law. Any corporation, or set of persons desiring to form a corporation and complying with its requirements, would be entitled to the bounty—the exemption from taxation—therein held out. There was no stipulation that that bounty should not be withdrawn or repealed. So long as it existed, all persons and corporations having the ability and desiring to avail themselves of its advantages could do so; but it was subject to withdrawal by the legislature at any time.

In *Manistee & Northeastern Railroad Co.* v. *Commissioner of Railroads* (118 Mich. 349), the identical question presented in this case was before the supreme court of the State of Michigan, which held, that this statute did not constitute a contract between the State of Michigan and the railroad companies complying with its provisions, to exempt such railroad companies from taxation until the same had been operated for the full period of ten years, saying

> "The question whether such a statute creates a contract, or confers a gratuity, or bounty, or privileges, existing bene placitum, is no longer debatable. It is settled by a long line of decisions that they are mere gratuities. The essential element of a

binding contract, viz., a consideration, is wanting. The question is ably and fully discussed in the following cases: East Saginaw Mfg. Co. v. City of East Saginaw, 19 Mich. 259 (2 Am. Rep. 82); Welch v. Cook, 97 U. S. 541; Tucker v. Ferguson, 22 Wall. 527; Grand Lodge F. & A. Masons of Louisiana v. City of New Orleans, 166 U. S. 143; West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595." (118 Mich. 350, 351.)

Christ Church v. Philadelphia, 24 How. 300;
Salt Co. v. East Saginaw, 13 Wall. 377, 379.

In *Tucker* v. *Ferguson*, supra, certain lands were granted by congress in 1856 to the State of Michigan, for the purpose of aiding in the construction of railroads. In 1857 the State accepted the grant of congress and gave to the Flint & Pere Marquette Railway Co. all lands granted by congress to the State for the construction of the road upon their right of way, by an act which provided that those lands should be exempt from taxation for the period of seven years. Those lands were mortgaged to the complainants as trustees to secure bonds upon which money was raised for the construction of the road. In 1866 and 1868, from time to time, statutes were enacted continuing the exemption from taxation; and in 1871 the lands were exempted from taxation for a period of three years. Prior to the expiration of the period of exemption fixed in that act, the State sought to tax the lands, and its right to do so was resisted upon the theory that the act of 1871 constituted a contract exempting them from taxation for the period therein specified. This court held that the grant of exemption was a mere gratuity, subject to recall by the State at its option. It was there said:

> "The provisions of the 37th section of the act of 1871, exempting the lands specified from local taxation until three years from the first of April, 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing, and did nothing, in return. As between individuals the stipulation would belong to the category of nude pacts. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed or recalled at pleasure." (22 Wall. 574.)

The early case of Tucker v. Ferguson was reaffirmed in *West Wisconsin Railway Company* v. *Board of Supervisors*, supra, where, under facts similar to those in the last mentioned case (though more strongly favoring the existence of a contract to exempt from taxation, by reason of the fact that the railroad company was required to perform certain acts within a period specified, in order to obtain the exemption), after reviewing the case of *Tucker* v. *Ferguson*, it was said:

> "We hold here, as we held there, that the exemptions in question were gratuities offered by the State, without any element of a contract. There was no assurance or intimation that they were intended to be irrevocable, or that the laws in question should not be at all times subject to modification or repeal in like manner as other legislation. If a different intent had existed, it would doubtless have been clearly manifested by the language employed. It would not have been left to encounter the possible results of such a struggle and conflict as have occurred in this litigation. The State asked for no promise from the company, and the company gave none. It was optional with the company to mortgage its lands or not, and to complete or not to com-

plete the road within two years. The early completion of the road was beneficial to the company as well as to the public. Until then, there could be no income, and there was a constant loss of interest. Every step of progress added to the value of the lands of the company through which the road was to pass. Every party was at liberty to take its own course. If the company came within the condition specified in the act of 1870 it would be in a position to take the gratuity offered by that act. If this were so, the State might continue or withdraw that gratuity when it took effect, as it might deem best for the public welfare; and it possessed the same power with reference to the exemption created by the prior act of 1864, while that act was operative. Neither party was, nor was intended to be, in anywise bound to the other. The State was at all times wholly unfettered as to both exemptions. The company chose to bring itself within the condition of the act of 1870. The State chose to continue the gratuity for a time, and then withdrew it. The exemption given by both acts was abrogated a year before the bonds of the last series were issued, and before the first term of exemption expired or the second began. The State did what it had an unqualified right to do. In such cases a reasonable doubt is fatal to the claim." (93 U. S. 597, 598.)

In *Welch* v. *Cook*, supra, a statute was passed in the District of Columbia exempting from general taxes for ten years from June, 1873, the real and personal property which should thereafter be actually employed within the limits of the District of Columbia for manufacturing purposes. In 1875 the exemption was withdrawn and proceedings were taken to tax real estate which had been invested in and was employed for manufacturing purposes under such circumstances as to entitle it to the exemption contained in the act of 1873. The validity of these taxes was contested, on the

ground that the exemption offered and the investment of large sums of money in a manufacturing plant constituted an irrevocable contract. It was there said, of the act creating the exemption:

> "It does not create a contract in the sense that it cannot be repealed. It has been frequently held that the incorporation of a company by special charter, with the exemption of its lands or other property from taxation, creates, upon the acceptance of the charter, a contract which will insure that exemption during the period specified. But the present case does not come within that rule. This is a bounty law, which is good as long as it remains unrepealed; but there is no pledge that it shall not be repealed at any time." (97 U. S. 542.)

These cases establish clearly the character of the legislation in question. There was no consideration on the part of the railroad companies for the grant made, and a consideration is as essential to the existence of a contract between the State and an individual as between individuals. So fast as the exemption was earned, the right thereto became vested, and the consideration for its support was the duties which had been performed on the part of the railroad companies. Those companies were not compelled to perform any duties by the act creating the exemption, and any acts which they may have performed were voluntary, the performance of which can be discontinued at their pleasure. It is certainly a peculiar circumstance if the State be bound for a period of ten years, and the railway company be not bound at all.

III.

Effect of reserved right to alter, amend or repeal acts of incorporation, as contained in Constitution and statute, as construed by State court.

The Constitution of the State of Michigan in force at the time of the enactment of the general railroad law and at the time of the incorporation into that law of the exemption contained in act 129, public acts of 1893, reserved the right to alter, amend, and repeal corporate charters and privileges as follows:

> "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

And the general railroad law, enacted in 1873, under which the railroad company to whose rights complainant succeeded, was organized, and of which the exemption claimed constitutes a part, contained in section 11 of article V, the provision:

> "This act may at any time be altered, amended or repealed, but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it," etc.

The reservations of the right to alter, amend and repeal acts of incorpration have been before the supreme court of Michigan in numerous instances, and that court has been uniform in its decisions to the effect that all acts of incorporation, and rights dependent upon their existence, are subject to this reserved power, and subject in all particulars to the control of the legislature.

Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140, 147;
Detroit St. Ry. v. Guthard, 51 Mich. 180, 182;

Detroit v. Railway, 76 Mich. 421, 426;
Mason v. Perkins, 73 Mich. 303, 318;
Bissell v. Heath, 98 Mich. 472, 478;
Attorney Genereal v. Looker, 111 Mich. 498, 501, —affirmed 179 U. S. 46;
Smith v. Lake Shore & M. S. Ry. Co., 114 Mich. 460, 472.

In the early case of *Detroit* v. *Detroit & Howell Plank Road Co.*, supra, Judge Cooley, in passing upon the authority of the legislature to amend and repeal corporate charters where the power to do so was reserved, said

> "But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles." (43 Mich. 147.)

In *Smith* v. *Lake Shore & Michigan Southern Railway Company*, supra, in considering the right of the legislature under its reserved constitutional and statutory authority to alter, amend or repeal corporate charters, to amend the provisions of the general railroad law (the law in question in this case) relating to rates of transportation, the court, after quoting with approval the language used by Judge Cooley in *Detroit* v. *Detroit & Howell Plank Road Co.*, supra, says:

"We think this is a fair statement of the effect of this reservation, and that, if the legislation in question can be construed as depriving the respondent of its property, it is invalid, as conflicting with other constitutional provisions. But we do not think that such is the effect of this legislation. * * * My conclusions are that the regulation is not unconstitutional as applied to roads within the control of the legislature, and that the respondent road, by its consolidation—formed, as it is, by a consolidation under an act passed since the enactment of the constitution reserving the power to alter, amend, or repeal—is subject to the general control of the legislature." (114 Mich. 473, 475.—Case reversed on other grounds, 173 U. S. 184.)

In *Attorney General* v. *Looker,* supra, the authority of the legislature to so alter acts of incorporation as to provide for a cumulative system of voting, by which a minority of the stockholders could acquire representation on the board of directors, was in question, and it was held that, acting under the power reserved by the Constitution to alter or repeal corporate charters, such legislation was competent, and that it was not objectionable upon the ground that it deprived the stockholders of vested rights; the court there reviews the cases at length and, in answer to the claim that the law changed the contract between the stockholders, and was therefore within the constitutional provision which forbids impairing the obligation of contracts, says that:

"It would seem to be a complete reply to this view to say that the stockholders knew when they entered into this corporation that the constitution reserved to the legislature the right to amend, alter, or repeal the law under which the corporation was organized. 1 Thomp. Corp. sec. 89. The stockholders are as much bound by this constitutional provision as though it were contained in the articles of incorporation. Parker v. Railroad Co., 109 Mass. 506. In

this case it was said: 'Many cases have arisen in this court involving the construction and application of the power to amend or alter charters. The reservation of power is broad and comprehensive. Whatever may be its limitation, it at least reserves to the legislature the right to make any reasonable amendments, regulating the mode in which the franchise granted shall be used and enjoyed, which do not defeat or essentially impair the object of the grant, or take away any property or rights which have become vested under a legitimate exercise of the powers granted.'" (111 Mich. 505; same case 179 U. S. 46.)

The construction by the supreme court of Michigan of the authority of the legislature under the reserved right to alter, amend or repeal corporate charters, contained in the State Constitution, is final and conclusive, and will be followed by the Federal courts.

Luther v. Borden, 7 How. 40;
Bucher v. Cheshire R. Co., 125 U. S. 555;
Pittsburg, etc. R. Co. v. Backus, 154 U. S. 421;
McElvaine v. Brush, 142 U. S. 155;
Miller's Exrs. v. Swann, 150 U. S. 132.

IV.

Effect of reserved right to alter, amend or repeal, as construed by Federal courts.

The Federal cases which uphold the right of a State to alter or amend a corporate charter where the right so to do is reserved in the Constitution, a prior general law, or the act of incorporation, are numerous, and sustain the following propositions:

1. The history of the inclusion in corporate charters of a clause reserving the right to alter, amend or repeal, indicates that such practice grew from a suggestion contained in the opinion of Mr. Justice Story in the Dartmouth College case (4 Wheat. 712) to the effect that corporations and corporate charters might by such reservation be kept under control.

2. Where the right to repeal, alter or amend is reserved, the corporate charter and all rights and privileges held thereunder are subject to legislative control, and may be repealed or taken away at the will of that body.

3. The sole limitation upon the authority of the legislature, where the right to repeal, alter or amend has been reserved, is, that vested rights which can be held independently of the charter or the charter contract, can not be interfered with.

4. An exemption from taxation is not a vested right, and may be taken away or altered where the right to alter, amend or repeal is reserved.

As said in *Spring Valley Water Works* v. *Schottler*, in speaking of the reservation, in the Constitution of 1849 of the State of California, of the right to alter, amend or repeal corporate charters, in terms similar to the provision in our Constitution,

> "The reservation of the power to alter or repeal the charters of corporations was [is] not new, for almost immediately after the judgment of this court in the Dartmouth College case (Dartmouth College v. Woodward 4 Wheat. 518), the states, many of them, in granting charters, acted on the suggestion of Mr. Justice Story in his concurring opinion (p. 712), and inserted provisions by which such authority was expressly retained." (110 U. S. 352.)

Greenwood v. Freight Co., 105 U. S. 13;
Citizens' Savings Bank v. Owensboro, 173 U. S. 651.

The Federal cases where this question has been presented have for the most part been analagous to the case at bar, and arose where an attempt had been made on the part of the State to take from the corporation an exemption from taxation which was claimed on the part of the corporation to be the subject of a contract beyond State interference.

In *Tomlinson* v. *Jessup* (15 Wall. 454), which is on all fours with the case at bar, the Northwestern Railroad Company was incorporated by the legislature of South Carolina in 1851 and at the time of its incorporation a general law of the State was in existence which provided that the charter of every corporation subsequently granted, and any renewal or amendment thereof, should be subject to amendment, alteration or repeal by legislative authority, unless the act granting the charter, renewal or amendment in express terms excepted it from the operation of that law. In 1855 an amendment to the company's charter was passed exempting it from taxation during the continuance of the charter; this amendment contained no provision excepting it from the operation of the provisions of the general act of 1841. In 1868, under a new constitution, acts were passed subjecting the property of the Northwestern Railroad Company to taxation, and a bill was filed to enjoin the officers of the State of South Carolina from levying a tax upon the property of the road. In delivering the opinion of the court, Mr. Justice Field, said of the act of 1841:

> "The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment as if incorporated into them. * * * The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interests with knowledge of

the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation. * * * Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State." (15 Wall. 457, 458, 459.)

The rule laid down in *Tomlinson* v. *Jessup* has been restated and reaffirmed in the following cases, and remains settled law to the present day:

Hoge v. Railway Co., 99 U. S. 349, 351;
Greenwood v. Freight Co., 105 U. S. 13;
Railroad Co. v. Maine, 96 U. S. 499;
Louisville Water Co. v. Clark, 143 U. S. 1;
Sinking Fund Cases, 99 U. S. 700;
Pearsall v. Great Northern Ry., 161 U. S. 663;
Covington v. Kentucky, 173 U. S. 232;
Citizens' Savings Bank v. Owensboro, 173 U. S. 636;

United States v. Union Pacific Ry., 160 U. S. 37, and cases cited.

See also:

Miller v. State, 82 U. S. 478, 499;
Holyoke Co. v. Lyman, 82 U. S. 500;
Pennsylvania College Cases, 80 U. S. 190;
Spring Valley Water Works v. Schottler, 110 U. S. 347;
Union Passenger Railway Co. v. Philadelphia, 101 U. S. 528.

In *Railroad Co.* v. *Maine*, supra, the Maine Central Railroad was the result of the consolidation of two lesser specially chartered roads, and by such consolidation became a corporation, existing under and subject to the general law of the State, which reserved, in an act passed in 1831, the right to amend, alter or repeal all acts of incorporation. Certain taxes imposed upon the company were resisted upon the ground that the statute in question was a violation of the obligation of contract. Of this objection it was said:

> "By the reservation in the law of 1831, which is to be considered as if embodied in that act [a subsequent law], the State retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities. The existence of the corporation, and its franchises and immunities, derived directly from the State, were thus kept under its control. Rights and privileges acquired by the company not constituting a part of the contract of incorporation, stand upon a different footing. But no such rights or interests are here involved." (96 U. S. 511.)

In *Hoge* v. *Railroad Company*, supra, the facts presented were similar to those passed upon in the case of *Tomlinson* v. *Jessup*, and in speaking of the general law of the State of South Carolina reserving the right to alter, amend or repeal, and in holding that under that reserved power an exemption from taxation could be taken away, it was said:

> "Its provisions constituted the condition upon which every charter was afterwards granted, amended or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it." (99 U. S. 353.)

In *Union Passenger Railway Co.* v. *Philadelphia*, supra, a corporation was created by statute to construct and operate a street railway in the city of Philadelphia, the act of incorporation containing a provision that the company should pay a license fee of $30 per year for each car operated. Four years later by statute the license fee was increased to $50 per year; and after complying with the amended law for a number of years, the company refused to pay the increased tax required, and upon suit brought to compel its payment it was held that under the power reserved in the Constitution to alter or revoke corporate charters, the State had ample power to make the amendment, and no injustice was done to the corporation, it being there said:

> "Power to alter, revoke or annul any charter of incorporation was vested in the legislature by the Constitution more than a quarter of a century before the defendant company was incorporated. Even when the language of the charter is sufficient to amount to a contract, it was twice admitted by Mr. Justice Story, in *Trustees of Dartmouth College* v. *Woodward*, that alterations and amendments may be made in the charter where the power for that purpose is reserved to the legislature in the act of incorporation. 4 Wheat. 518, 708, 712. Acts of incorporation granted subsequently to the adoption of the Constitution must be construed as if the provision of the in-

strument in question was embodied in the charter." (101 U. S. 539.)

In *Louisville Water Co.* v. *Clark*, supra, the corporation was created by an act passed in 1854. In 1856 a general law was enacted reserving the right to amend or alter all statutes of incorporation at the will of the general assembly, unless a contrary intent was therein plainly expressed, provided that no amendment or repeal should impair other rights previously vested. In 1882 an act was passed exempting the water company's property from taxation. Subsequently and in 1886 it was provided that all property within the State, with certain exceptions, should be assessed and taxed at a uniform rate, and pursuant to this act a tax was levied upon the property of the Louisville Water Company, which filed a bill to prevent the seizure and sale of its property for the tax, claiming that the law of 1882, granting it exemption from taxation, constituted a contract between it and the State, which could not be withdrawn by a subsequent general assembly. The court, however, held that the exemption from taxation could be repealed without impairing the obligation of the contract, saying, through Mr. Justice Harlan:

> "In short, the immunity from taxation granted by the act of 1882 was accompanied by the condition—express in the act of 1856 and made a part of every subsequent statute, when not otherwise expressly declared—that, by amendment or repeal of the former act, such immunity could be withdrawn. Any other interpretation of the act of 1856 would render it inoperative for the purposes for which, manifestly, it was enacted." (143 U. S. 12.)

In *Covington* v. *Kentucky*, supra, the city of Covington was authorized by statute to build and operate a water system, applying the net earnings to the construction of roads, and it was provided in the act that the property used for that purpose "shall be and remain forever exempt from State, county and city tax." A general statute enacted in 1856 reserved the right to alter, amend or repeal statutes, provided

vested property rights were not interfered with. The supreme court of the State of Kentucky decided that the water works was not a governmental institution, placing it, so far as the question of taxation was concerned, upon the same ground as a private corporation. In 1891 the Constitution of Kentucky was amended, requiring all property to be uniformly taxed; and pursuant thereto tax was imposed upon the property invested in the water works of the city of Covington, which was resisted upon the ground that the statute creating the exemption constituted a contract between the city and State. It was held that in view of the reserved power contained in the general statute, any contract which had been entered into was subject to alteration, as the statute reserving the right to amend or repeal was itself a part of that contract, the court saying:

> "There was in the act no 'plainly expressed' intent never to amend or repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they were situated, should be forever exempt from State, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared, that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interest required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject

> to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture." (173 U. S. 238, 239.)

The examination of the Federal cases enunciating the same principles as those above set forth might be carried out to much greater length; but sufficient cases have been adverted to, to indicate clearly the rulings upon the question presented; and under the authority of the above cases, I assert with confidence that the act of 1897 is valid and constitutional, and does not violate the obligation of contract.

V.

Right of repeal, alteration and amendment, reserved in fundamental law, applicable to, and gives right to withdraw exemptions from taxation contained in acts of incorporation.

The complainant seeks to avoid the effect of the reservation by the Constitution (art. xv, § 1), of the right to alter, amend and repeal all acts of incorporation, claiming that as the Constitution is divided into articles, one of which is entitled "Finance and Taxation," (xiv) and another of which is entitled "Corporations," (xv) and the general railroad law is also divided into separate articles, one of which refers to taxation (iii), the exemption from taxation incorporated in the general railroad law by amendment in 1893 was enacted pursuant to the article of the Constitution relating to taxation and not pursuant to section 1 of the article relating to corporations, and that, therefore, it is not within the provision of that section that "all laws passed pursuant to this section may be altered, amended or repealed." The claim may be stated, in other language, thus,—that it is within the

authority of the legislature to include within an act for the incorporation of railroad companies an irrevocable contract of exemption from taxation, notwithstanding the reservation by the Constitution of the right to alter, amend or repeal corporate charters.

At the risk of adding dignity to the objection, we will consider it at some length. This reservation came into the organic law of Michigan in 1850. Its purpose was to maintain control over corporate charters, rights and privileges, and to prevent the conferring of irrevocable privileges, whether of taxation or otherwise, upon corporations. Immunity from taxation was unquestionably one of the privileges desired to be kept under control and the constitutional provision must be given a liberal construction to carry out its evident purpose.

(*a*) Complainant's claim is based upon a fallacy in assuming that a State statute is enacted in pursuance of authority conferred by any particular paragraph or article of a State Constitution. All State laws are enacted by the legislature in pursuance of the general legislative power conferred upon it by the Constitution. The State Constitutions and the specific provisions contained therein (with certain limited exceptions), are not designed to grant to the several legislatures the right to pass enactments of a specified character. The fundamental canon is that the State Constitutions operate as a limitation and not a grant of power, and that the several legislatures possess all legislative power not delegated to the Federal government or withheld by the provisions of the State Constitution. This is true in Michigan (*Attorney General* v. *Preston*, 56 Mich. 177), and section 1 of article XV has been held to operate as a limitation of power. (*Nelson* v. *McArthur*, 38 Mich. 204).

The inclusion of section 1 of article XV in the Constitution limited the power of the legislature to create corporations and required their creation by general laws, while, in the absence of that provision, its power would have been plenary, and its authority sufficient to create by general or

special laws. The authority, therefore, of the legislature to pass statutes relating to particular subjects comes, not from any particular section or article of the Constitution, but from its inherent character as a legislative body, possessing all power not inhibited, and specific constitutional provisions operate simply as limitations.

The Constitution contains a separate article which relates to railroads and the establishing of maximum rates for the carriage of passengers and freight. If force be given to complainant's claim, it must likewise be held that the provision of the general railroad law establishing reasonable maximum rates of charge is adopted pursuant to the provision of the Constitution relating to railroads and is not within the reserved power. Of this question the State supreme court has taken the opposite view and held that the provision of the general railroad law fixing maximum rates for the carriage of passengers is within the reserved power, to amend, of the fundamental law. (*Smith* v. *Lake Shore & Michigan Southern Railway Company*, 114 Mich. 472.) This is binding upon the Federal courts, and decisive.

The Constitution also contains an article entitled "Miscellaneous Provisions," and in this article provisions are made in reference to the acquisition of property for public use by the exercise of the right of eminent domain. If complainant's claim is sustained, the provisions of the general railroad law relating to eminent domain and providing for the acquisition of property thereby must likewise be held to be beyond the scope of the reserved right. To thus state the effect of complainant's objection is to fully answer it.

(*b*) If the provision of the general railroad law relating to taxation and which contained the exemption claimed by complainant, is a part of the general railroad law, it is beyond controversy within the reserved right to alter, amend and repeal acts of incorporation, as contained in the Constitution. Is it a part of the act of incorporation? Provisions relating to taxation have always been regarded as proper elements of a corporate charter in Michigan, and very few

acts of incorporation, general or special, can be found which do not contain a provision upon this question. The title to the general railroad law is "An act to revise the laws providing for the incorporation * * * and to fix the duties and liabilities of all railroad" corporations. The amendment of 1893, under the rule in Michigan, became a part of this act, as fully to all intents and purposes as though it had been originally contained therein (*Randall* v. *Schweikert*, 115 Mich. 386), which, as amended, constitutes the charter of the corporation organized thereunder (*Mason* v. *Perkins*, 73 Mich. 320).

Under the Michigan Constitution (§ 20, art. IV) no law can embrace more than one object, and under an act, entitled "for the incorporation" of railroad companies, it would be impossible to enact a provision referring to independent matters.

Either the exemption in question was a part of the general railroad law,—a part of the charter of the complainant and within the reserved power of the legislature, or it was a gratuity under the cases previously cited (post pages 8 *et seq*) and subject to be withdrawn at any time.

(*c*) A similar question to that here presented was before the supreme court of Maryland, in *Northern Central Railway Company* v. *State* (90 Md. 447), whose judgment was reviewed by this court in *Northern Central Railway Company* v. *Maryland* (187 U. S. 269). In those cases the railway company was the creature of a reorganization under a Constitution providing:

> "Corporations may be formed under general laws, but shall not be created by special act, * * * all charters granted or adopted in pursuance of this section and all charters heretofore granted and created subject to repeal or modification may be altered from time to time, or be repealed."

The corporation claimed that it had succeeded to a certain immunity from taxation possessed by its predecessors. The State denied the claim, and in the course of litigation

to settle the question, an act was passed, for the purpose of adjusting the differences and fixing a specific rate of taxation to be paid by the corporation, which was accepted by the railway company. Subsequently an act was passed repealing this act and it was claimed that the repealing statute violated the obligation of contract, as the exemption was not within the reserved right to alter, amend or repeal, not being a part of the act of incorporation, and being supported by sufficient consideration, namely, a compromise of the pending litigation. The State court took the view that the act did not operate to create an inviolable contract, and that the exemption conferred thereby was within the reserved right of the legislature, and subject to be withdrawn, saying:

> "'Be that, however, as it may, it was not within the power of the legislature under the Constitution of the State to grant to the appellee immunity from taxation or any other corporate privilege beyond the power of a subsequent legislature to repeal or revoke.' It is to be observed that the court does not rest the inability of the legislature to grant to a corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of the want of power in the legislature under the Constitution to make such a grant at all. The court certainly in effect determines that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the Constitution referred to, and is, therefore, subject to alteration or repeal by future legislatures." (90 Md. 470, 471.)

The view taken by the State court was sustained by the Federal court, which, after quoting a portion of the above language, said

> "Without pausing to consider whether, as contended, the rule as thus announced may have been in some respects too broadly stated, we think it clear

that the mere form adopted by a legislature in conferring a right on a corporation cannot be controlling, for if it were so, the provision of the Constitution, instead of being commanding and prohibitive would merely be precatory or advisory." (187 U. S. 269.)

VI.

Extent of reservation of right to alter, amend or repeal contained in general railroad law.

Not only the Constitution, but also the general railroad law, contained a reservation of the right to alter, amend or repeal; that in the general law being contained in section 11 of article V, the material portion being:

> "This act may at any time be altered, amended, or repealed, but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it."

A difference in the language of the Constitution and the statute is noted. The statute providing that the exercise of the right of alteration, amendment or repeal "shall not affect the rights of property." This difference in language is not a difference in meaning,—the act expressing exactly what the Constitution implies. Provisions of Constitutions and statutes reserving absolutely the right to alter, amend or repeal, cannot and do not confer any power to affect vested property rights, as those rights are secured from violation by the Federal Constitution. (*St. L. I M. & S. R. Co.* v. *Paul* 173 U. S. 408, 409; *Smith* v. *L. S. & M. S.*, 173 U. S. 690.) Hence if the Constitutional provision would be broad enough to permit the withdrawal of immunity from taxation, such action could likewise be taken under the reserved power of the statute.

If immunity from taxation is a vested property right, it

could not be withdrawn, either under the Constitutional or the statutory provision; if it is not a vested property right, it could be withdrawn under either. We, therefore, consider the character of this immunity.

Immunity from taxation is not a property right (*Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 652, 653), nor is it a franchise (*Morgan* v. *Louisiana,* 93 U. S. 221, 223), but the exemption from taxation is a mere privilege (*Wilson* v. *Gaines,* 103 U. S. 417, 421, 422; *Detroit Street Railway* v. *Guthard,* 51 Mich. 180; *St. Louis & San Francisco Railway Company* v. *Gill,* 156 U. S. 649, 650), which does not inhere in the property (*Chesapeake & Ohio Railway* v. *Miller,* 114 U. S. 176, 184).

The case of *Citizens' Savings Bank* v. *Owensboro,* supra, is decisive upon the character of immunity from taxation as being a property right or a mere privilege. In that case, the general law of the State of Kentucky contained a provision as follows:

> "That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights *previously vested.*"

It was sought to withdraw a partial exemption from taxation, and plaintiff made the claim that rights of this character were taken out of the operation of the repealing power by the proviso that "no amendment or repeal shall impair other rights previously vested," which in substance and effect is similar to the reservation of the Michigan general railroad law. Of this objection, the court said:

> "It is urged that as the act of 1856 provides that other rights previously vested could not be taken away by the repealing act, therefore the exemption from taxation could not be withdrawn; but this is a

mere form of restating the arguments already examined, and is tantamount to the reassertion of the proposition that the limited taxation established by the Hewitt act, or the one conferred by the charter, could not be taken away at all. Referring to this subject, this court in *Greenwood* v. *Freight Company* (ubi supra), said (p. 17) 'Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it that may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it or on the soundness of the reasons which prompted it.' In considering what constituted vested rights, the court clearly pointed out that rights of this character did not embrace mere privileges or franchises conferred by the granting act, and such rights obviously came within the power to repeal and amend, and were not within the category of those taken out of the reach of such power." (173 U. S. 652, 653.)

The repealing clause of the Kentucky statute was also held to be sufficient to authorize the withdrawal of exemptions from taxation in other cases (*Louisville Water Co.* v. *Clark*, 143 U. S. 1, 12, 18; *Covington* v. *Kentucky*, 173 U. S. 231, 238), sustaining clearly the proposition that immunity from taxation is not a vested property right.

See also:

Detroit Street Railway Company v. Guthard, 51 Mich. 182, 183.

Detroit v. Detroit & Howell Plank Road Company, 43 Mich. 146, 147.

(*d*) It is questionable as to whether the Michigan legislature has authority to create an inviolable contract to exempt corporations from taxation. (*Walcott* v. *People*, 17 Mich. 68, 81, 82.)

VII.

Section 3 of article III of the general railroad law does not violate the commerce clause of the Federal Constitution.

A reference to that section will indicate that neither the state nor interstate receipts are taxed, that the tax is upon the "property and business" of the corporation, and that the basis of that tax is the actual earnings of the road in Michigan, computed by adding to the income derived from its business transacted entirely within the State, such proportion of the income arising from interstate business as the length of the road over which such interstate business is carried in this State bears to the entire length of the road over which such interstate business is carried. If the tax is not on the interstate receipts, the mode of determining the amount of such tax is immaterial, and the validity of the law fixing them is a matter of legislative policy and discretion, and is not open to criticism by the courts. This is clearly indicated by the cases of *Home Insurance Company* v. *New York*, 134

U. S. 594, 600, and *Maine* v. *Grand Trunk Railway Company*, 142 U. S. 217, 228.

In *Home Insurance Company* v. *New York*, supra, in speaking of a law imposing an excise tax, it was said:

> "The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows." (134 U. S. 600.)

In the case of *Maine* v. *Grand Trunk Railway Company*, supra, which I consider to be decisive of this question, the amount of franchise tax upon the Grand Trunk Railway Company was by statute made to depend upon the proportion of its gross transportation receipts (both intra and interstate), found by dividing such gross receipts by the total number of miles operated, and multiplying the result by the number of miles operated within the State of Maine. It was there held that the tax imposed was valid, and that the mere fact that receipts from interstate commerce were taken as a basis for determining its amount did not affect the case. It was there said:

> "The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed. * * * But a resort to those receipts was simply to ascertain the value of the business done by the corporation,

and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. * * * There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred." (142 U. S. 228, et seq.)

Western Union Telegraph Company v. Massachusetts, 125 U. S. 530;
Pullman Palace Car Company v. Pennsylvania, 141 U. S. 18;
Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421;
Western Union Telegraph Company v. Taggart, 163 U. S. 1;
Adams Express Company v. Ohio State Auditor, 165 U. S. 194.

In conclusion, I submit that act 228 of 1897, revoking the exemption from taxation in question, is valid and constitutional, and that the demurrer interposed should be sustained.

CHARLES A. BLAIR,
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ROGER IRVING WYKES,
Of Counsel.

APPENDIX.

CONTAINING IN FULL

ACT 129 OF 1893

AND

ACT 228 OF 1897.

ACT No. 129 of 1893.

"An Act to amend section three of article three of act number one hundred and seventy-four of the Public Acts of eighteeen hundred eighty-three, entitled 'An act to amend sections seven, thirty, thirty-six and forty-one of article two, and sections three and five of article three, and section fourteen of article four, and to add two new sections to article two, to stand as sections forty-five and forty-six, and a new section to article five to stand as section twenty-two of an act, entitled "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroads, and other corporations owning or operating any railroad in this State,"' approved May one, eighteen hundred and seventy-three, being act number one hundred and ninety-eight, session laws of eighteen hundred and seventy-three as amended by act number one hundred and seventy-four of the Public Acts of eighteen hundred ninety-one.

SECTION 1. *The People of the State of Michigan enact,* That section three of article three of act number one hundred and seventy-four of the Public Acts of eighteen hundred eighty-three, entitled 'An act to amend sections seven, thirty, thirty-six and forty-one of article two, and sections three and five of article three, and section fourteen of article four, and to add two new sections to article two, to stand as sections forty-five and forty-six, and a new section to article five to stand as section twenty-two of an act, entitled"An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owning or operating any railroad in this State,"' approved May one, eighteen hundred and seventy-

three, being act number one hundred and ninety-eight, Session Laws of eighteen hundred and seventy-three, as amended by act number one hundred and seventy-four of the Public Acts of eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

SEC. 3. Every railroad company formed under the provisions of this act, or which now is or may hereafter be brought under the provisions of the general law of this State for the taxation of railway or railroad corporations, and every railroad company owning or operating any railroad situated in whole or in part in this State shall, on or before the first day of July in each year, pay to the State Treasurer on the statement of the Auditor General a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, viz.: Upon all such gross income not exceeding two thousand dollars per mile of road actually operated within this State, two per cent of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, two and one-half per cent thereof; upon all such gross income in excess of four thousand dollars and not exceeding six thousand dollars per mile, three per cent thereof; and upon all such gross income in excess of six thousand dollars per mile, not in excess of eight thousand dollars per mile, three and one-half per cent thereof; and upon all such gross income in excess of eight thousand dollars per mile of road so operated, four per cent thereof. And when the railroad lies partly within and partly without this State, prima facie, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State, such proportion of the income of said company arising from interstate business, as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said

interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so excepted shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon as is other real estate in the several townships or municipalities within which the same may be situated: Provided further, That the rate of taxation fixed by this act or any other law of this State shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this State north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile, except in so far as said line so built shall extend south of said parallel, but no such company shall be entitled to the immunity from taxation herein provided, when the same is owned or operated by existing companies, until the report of earnings to the Commissioner of Railroads required by the laws of this State, containing the earnings of such lines hereafter built, separate and distinct from the earnings of existing lines shall be made and filed.

All acts and parts of acts contravening the provisions of this act are hereby repealed.

This act is ordered to take immediate effect.

Approved May 27, 1893."

ACT No. 228 of 1897.

"An Act to amend section three (3) of article three (3) of act one hundred and ninety-eight (198), Session Laws of eighteen hundred and seventy-three, as amended by act forty-five (45), Public Acts of eighteen hundred and seventy-nine, as amended by act one hundred and seventy-four (174), Public Acts of eighteen hundred and ninety-one, as amended by act one hundred and twenty-nine (129), Public Acts of eighteen hundred and ninety-three, entitled 'An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all said roads and other corporations, owning or operating any railroad in this State,' approved May one, eighteen hundred and seventy-three, being compiler's section three thousand three hundred and sixty (3360), Howell's Annotated Statutes of Michigan.

SECTION 1. *The People of the State of Michigan enact,* That section three (3) of article three (3) of act one hundred and ninety-eight (198), Session Laws of eighteen hundred and seventy-three, as amended by act forty-five (45), Public Acts of eighteen hundred and seventy-nine, as amended by act one hundred and seventy-four (174), Public Acts of eighteen hundred and ninety-one, as amended by act one hundred and twenty-nine (129), Public Acts of eighteen hundred and ninety-three, entitled 'An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all said roads and other corporations, owning or operating any railroad in [this] the State,' approved May one, eighteen hundred and seventy-three, being compiler's section three thousand three hundred and sixty

(3360), Howell's Annotated Statutes of Michigan, be and the same is hereby amended so as to read as follows:

SEC. 3. Every railroad company and union railroad station and depot company owning or operating any railroad situated in whole or in part in this State, shall, on or before the first day of July in each year, pay to the State Treasurer, on the statement of the Auditor General, a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner [viz.], namely: Upon all such gross income not exceeding two thousand dollars per mile of road actually operated within this State, two and one-half per cent of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, three and one-fourth per cent thereof; upon all such gross income in excess of four thousand dollars and not exceeding six thousand dollars per mile, four per cent thereof; and upon all such gross income in excess of six thousand dollars per mile, and not exceeding eight thousand dollars per mile, four and one-half per cent thereof; and upon all such gross income in excess of eight thousand dollars per mile of the road so operated, five per cent thereof; that all gross income of union railroad station and depot companies whose earnings are in excess of twenty thousand dollars per mile shall pay on all such gross incomes in excess of twenty thousand dollars per mile of road so operated, ten per cent thereof. And when the railroad lies partly within and partly without this State, prima facie, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State, such proportion of the income of said company arising from interstate business, as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the prop-

erties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so accepted shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities within which the same may be situated.

All acts or parts of acts contravening the provisions of this section of this act are hereby repealed.

Approved June 4, 1897."

Supreme Court of the United States.

No. 77.—October Term, 1903.

The Wisconsin and Michigan Railway Company, Appellant, *vs.* Perry F. Powers, Auditor General of the State of Michigan.	Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

[November 30, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the United States Circuit Court dismissing the plaintiff's bill on demurrer. The bill seeks to enjoin the auditor general of the State of Michigan from collecting a tax, on the ground that the law imposing the tax is contrary to the Constitution of the United States as impairing the obligation of contracts and interfering with interstate commerce.

The alleged contract is contained in a law of May 27, 1893, § 3, which, after levying a specific tax on railroads, provided "that the rate of taxation fixed by this act or any other law of this State shall not apply to any railway company hereafter building and operating a line of railroad within this State north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile, except," &c. Afterwards, on October 23, 1893, the Menominee and Northern Railroad Company was incorporated under the laws of the State, and forthwith conveyed all its property, rights and franchises to the plaintiff, a Wisconsin corporation, which is assumed to stand in the shoes of the Michigan company. The plaintiff thereupon constructed the road. This road is north of parallel forty-four, its gross earnings never have been equal to four thousand dollars per mile, and it would be entitled to the exemptions just stated if the law of 1893 still were in force. But on June 4, 1897, the State passed a law amending the act of 1893, and levying a "specific tax upon the property and business of [every] railroad corporation operated within the State," and enacted that "when the railroad lies partly within and partly without this State, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State, such proportion of the income of said company arising from the interstate business as the length of the road

over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried." This is the the law which the plaintiff says is unconstitutional for the reasons above set forth.

The demurrer to the bill was sustained on the ground that the act of 1893 made no valid contract of exemption from taxation, and that the act of 1897, repealing the exemption granted in 1893, was a constitutional law.

The plaintiff makes a supplemental alternative argument that the later statute should not be construed to repeal the act of 1893 with regard to roads in the plaintiff's position. If that were so the plaintiff would have no standing in this Court. But the repeal is plain from the express words at the end of the section quoted from the act of 1897, repealing all acts or parts of acts contravening the provisions of that section, from the fact that it is an amendment of the section quoted from the act of 1893, and from the case of *Manistee & Northeastern Railroad Co.* v. *Commissioner of Railroads*, 118 Mich. 349, 350. See also *Welch* v. *Cook*, 97 U. S. 541. On that question we follow the State court. *Northern Central Railway Co.* v. *Michigan*, 187 U. S. 258, 267.

The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this Court. A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in *East Saginaw Salt Manuf. Co.* v. *East Saginaw*, 13 Wall. 373. ("*Salt Co.* v. *East Saginaw.*") *S. C.*, 19 Mich. 259. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Christ Church* v. *Philadelphia County*, 24 How. 300; *Tucker* v. *Ferguson*, 22 Wall 527; *Grand Lodge of the State of Louisiana* v. *New Orleans*, 166 U. S. 143. See *Tomlinson* v. *Jessup*, 15 Wall. 454, 459. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further, *Welch* v. *Cook*, 97 U. S. 541, and *Manistee & Northwestern Railroad Co.* v. *Commissioner of Railroads*, 118 Mich. 349, in which the State court deals with this very act.

It may be that a State, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A State might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases —

a circumstance to take into account in determining whether the State has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while no doubt in some cases between private persons the above distinctions have not been kept very sharply in mind, *Martin* v. *Meles*, 179 Mass. 114, 117, it is clear that we should require an adequate expression of an actual intent on the part of the State to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See *Vicksburg, Shreveport & Pacific Railroad* v. *Dennis*, 116 U. S. 665, 668. Looking at the case in this way, then, we find no such adequate expression. No doubt the State expected to encourage railroad building, and the railroad builders expected the encouragement, but the two things are not set against each other in terms of bargain. See *Covington* v. *Kentucky*, 173 U. S. 231, 238, 239.

But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefor it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, and therefore makes it unnecessary to consider the usual power to alter, amend or repeal charters, &c., contained in the constitution of Michigan, *Tomlinson* v. *Jessop*, 15 Wall. 454; *Covington* v. *Kentucky*, 173 U. S. 231; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, or a simi-

lar power in the general railroad law of 1873, of which the above acts of 1893 and 1897 were amendments through intervening amending acts.

We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on "the property and business of such railroad corporation operated within the State," computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, 228. See also *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1.

Decree affirmed.

Mr. Justice WHITE, not having heard the arguments, took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.